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Native American Empowerment Through Digital Repatriation

A thesis

presented to

the faculty of the Department of Liberal Studies

East Tennessee State University

In partial fulfillment

of the requirements for the degree

Master of Arts in Liberal Studies with a concentration in Archival Studies

by

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December 2013

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ABSTRACT

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Following the Enlightenment, Western adherence to positivist theory influenced practices of Western research and documentation. Prior to the introduction of positivism into Western scholarship, innovations in printing technology, literary advancements, and the development of capitalism encouraged the passing of copyright statutes by nation-states in fifteenth century Europe. The evolution of copyright and positivism in Europe influenced United States copyright and its protection of the author, as well as the practice of archiving and its role in interpreting history. Because Native American cultures practiced orality, they suffered the loss of their traditional knowledge and cultural expressions not protected by copyright. By incorporating postmodern perspectives on archiving and poststructuralist views on the formation of knowledge, this thesis argues that Native American tribes now use Western forms of digital technology to create archives, record their histories, and reclaim control of their traditional cultural expressions.

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DEDICATION

I dedicate this thesis to my family, who have loved and believed in me; to my love, Dylan Booth; and to my dearest friend, Kurt Ward.

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Great appreciate and thanks to my advisor, Dr. Marie Tedesco; my committee members, Dr. Jill Leroy-Frazier, Dr. Victoria Meyer, and Ms. Amy Collins; and to the staff at the Archives of Appalachia for helping and supporting me through the entirety of this project.

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CHAPTER 1

INTRODUCTION

This research began as a consequence of my interest in memory studies and how collective memory develops, evolves, and promotes cultural identities. Graduate courses and research allowed me to develop an interest in marginalized societies. First, my graduate studies led me to interdisciplinary research on the Holocaust documentary *Night and Fog* by Alain Resnais and its role as a site of memory. Following this research and continuing with interest in the theme of memory, my research led me to the Maori of New Zealand and their progress in regaining their cultural memory and intellectual property rights from Western institutions. Aboriginal intellectual property rights are currently a debated topic in discussion and scholarship in the area of archives, museums, and cultural heritage centers; however, more interesting to me was the delayed response by United States' archival organizations and museums in regard to returning Native American cultural materials and allowing Native Americans control of their intellectual property. This chapter first defines a number of terms critical to my research and then discusses how these terms correlate to archival practice especially in regard to evolution of archival theory with postmodernism and poststructuralism. Finally, this chapter addresses the structure of the thesis.

Critical Terms

Archival repositories are organizations or divisions within an organization that collect, process, and preserve records of enduring value for organizations, families, or individuals.¹ Archival documents or “archives” include, as stated on the Society of American Archivists’ website, “photographs, films, video and sound recordings, computer tapes, and video and optical

¹ Society of American Archivists, “SAA Glossary,” Society of American Archivists, <http://www2.archivists.org/glossary/terms/a/archives> (accessed July 31, 2013). For more detailed definitions on “archives” and the various components of its profession, consult the SAA Glossary.

disks, as well as the more traditional unpublished letters, diaries, and other manuscripts.”²

According to the International Council of Museums (ICOM), a museum “is a non-profit, permanent institution in the service of society and its development, open to the public, which acquires, conserves, researches, communicates and exhibits the tangible and intangible heritage of humanity and its environment for the purposes of education, study and enjoyment.”³ Cultural heritage centers do not have a concrete definition; however, they are institutions that promote cultural history and heritage through research, preservation, and public outreach and education.⁴ Numerous times in this thesis the term ‘institutions of memory’ comes into discussion. Included in this term are archives, museums, and various cultural heritage centers, all of which play an integral role in the formation and preservation of collective memory and cultural identity.⁵

Maurice Halbwachs best explained collective memory in his work *On Collective Memory*. Collective memory resides in numerous social frameworks and it is through these frameworks that individuals place themselves into groups in order to participate in the process of remembrance.⁶ Examples of social frameworks include social class, religious institutions, and family.⁷ Halbwachs stresses that memories “are part of a totality of thoughts common to a group, the group of people with whom we have a relationship at this moment, or with whom we have

² Society of American Archivists, “So You Want to Be an Archivist: An Overview of the Archives Profession,” SAA, <http://www2.archivists.org/profession> (accessed August 21, 2013). This thesis refers to the places that house the documents when using the term “archives.”

³ International Council of Museums, “Museum Definition,” ICOM, <http://icom.museum/the-vision/museum-definition/> (accessed August 21, 2013).

⁴ For examples of cultural heritage centers please visit The University of Pennsylvania’s Cultural Heritage Center http://www.pennchc.org/page/about_US, the Cultural Heritage Center of the Bureau of Educational and Cultural Affairs <http://eca.state.gov/cultural-heritage-center>, the South Dakota State Historical Society Cultural Heritage Center <http://history.sd.gov/visit/>, and the Citizen Potawatomi Nation’s Cultural Heritage Center <http://www.potawatomiheritage.org/about-US>.

⁵ Pierre Nora, “Between Memory and History,” *Representations* 26(1989): 12. For more on institutions of memory, see Jay Winters’ *Sites of Memory, Sites of Mourning: The Great War in European Cultural History*.

⁶ Maurice Halbwachs, *On Collective Memory*, ed. and trans. Lewis A. Coser, (Chicago and London: University of Chicago Press, 1992), 38.

⁷ Lewis Coser, “Introduction,” in Maurice Halbwachs, *On Collective Memory*, ed. and trans. Lewis A. Coser, (Chicago and London: University of Chicago Press, 1992), 22.

had a relation on the preceding day or days. To recall them it is hence sufficient that we place ourselves in the perspective of this group, that we adopt its interests and follow the slant of its reflections”.⁸ However, individuals are members of multiple groups and that allows them to interpret events or embrace facts to fit their social frameworks. For example, a familys’ collective memory may come under the influence of personal memories, religious affiliations and social class.⁹ Collective memory, according to Halbwachs, is then a consensus of individual memories that comprise a group memory. Collective memory cannot exist without a group and a group cannot exist without individuals. Collective memory relates to the current debate on Native Americans and their intellectual property rights in archives because archives house cultural heritage materials that are integral components in constructing and promoting collective memory. Understanding collective memory encourages scholars to examine the importance of the role of archivists in collecting and preserving cultural heritage.

This thesis uses the definition of intellectual property from the World Intellectual Property Organization which states, “Intellectual property (IP) refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce.”¹⁰ However, intellectual property does not include all types of creative expression and innovations that are produced by Native American cultures, as well as by indigenous cultures in other parts of the world. These forms of intellectual property are known as traditional knowledge and expressions and can include dance, ritual, song, and other depictions of cultural practices.¹¹ Some documentary materials also fall under the category of cultural depictions. The Protocols for Native American Materials (PNAAM) provides some examples of documentary

⁸ Halbwachs, *On Collective Memory*, 52.

⁹ Ibid.

¹⁰ World Intellectual Property Organization, “About IP - What Is Intellectual Property?” World Intellectual Property Organization, <http://www.wipo.int/about-ip/en/> (accessed July 31, 2013).

¹¹ Ibid.

materials in both digital and physical forms including “photographs, moving images (films), records of tribal governments, field notes, correspondence, research data, oral histories, audio recordings, graphic art, maps, and publications.”¹² Because these forms of intellectual property fall under the category of indigenous traditional knowledge, many copyright laws and intellectual property systems do not provide them adequate protection.¹³

Evolution of Archival Theory with Postmodernism and Poststructuralism

Archivists perform numerous actions that directly affect archival holdings in any institution; particularly important is the act of appraising collections. Archivists appraise or access the research value of materials in collections prior to accessioning and processing the collection into their holdings.¹⁴ Ultimately, the archivist decides what materials the archive holds and makes accessible. Terry Cook, an influential author and archivist, states that archivists:

are doing nothing less than shaping the future of our documentary heritage. They determine what the future will know about its past, which is often our present. As a profession, we archivists need to realize continually the gravity of this task. We are literally creating archives. We are deciding what is remembered and what is forgotten, who in society is visible and who remains invisible, who has a voice and who does not.¹⁵

As noted by Cook, archivists play an active role in the preservation, interpretation, and ethical execution of determining what materials remain accessible for scholars to examine and to help create collective memory. However, the acceptance of the archivist as an active participant in the formation of written history and collective memory is the result of the evolution of archival theory and practice. Archives and archival practice in the United States originated from Western

¹² Protocols for Native American Materials, “FAQs,” First Archivists Circle, <http://www2.nau.edu/libnap-p/faq.html> (accessed July 31, 2013).

¹³ Ibid.

¹⁴ Society of American Archivists, “SAA Glossary,” Society of American Archivists, <http://www2.archivists.org/glossary/terms/a/appraisal> (accessed October 23, 2013).

¹⁵ Terry Cook, “Remembering the Future: Appraisal of Records and the Role of Archives in Constructing Social Memory,” from *Archives, Documentation, and Institutions of Social Memory, Essays from the Sawyer Seminar*, ed. Francis X. Blouin Jr. and William G. Rosenberg (Ann Arbor: University of Michigan Press, 2007): 169.

European and English ideas that formed the basis of classical archival theory. The practice of researching and documenting to create historical knowledge originated from the eighteenth century Enlightenment and received further encouragement from theories of positivism during the nineteenth century by Auguste Comte.¹⁶ According to Joe Moran, while promoting his theoretical ideas, Comte devised the term sociology to expound upon his theories of positivism in 1830. Moran states, Comte “proposed that all real knowledge was gained through empirical methods and that the procedure of natural sciences could thus be transferred to the social sciences.”¹⁷ Emile Durkheim set forth his own interpretation of sociological positivism in which, as stated by Moran, he “envisioned society as having a kind of objective reality independent of individual agency and urged sociologists to consider social facts as things.”¹⁸ The implications of positivist theory complemented Western society with its economic system of capitalism, written language, and urge to document and archive the past because Western society relied on recorded history to construct knowledge. To fully comprehend positivism and its effects on archival studies, the theories of poststructuralism and postmodernism need to be explained.

Ben Agger, social theorist, uses critical theory, poststructuralism, and postmodernism to identify the shortcomings of positivism in research and scholarship within contemporary societies.¹⁹ To be more specific, Agger states, “Above all, critical theory, poststructuralism, and postmodernism are effective as critiques of positivism, interrogating taken-for-granted assumptions about the ways in which people write and read science.”²⁰ These assumptions Agger references are the assumptions positivists make when they study evidence to document research.

¹⁶ Ben Agger, “Critical Theory, Poststructuralism, Postmodernism: Their Sociological Relevance,” *Annual Review of Sociology* 17 (1991):109.

¹⁷ Joe Moran, *Interdisciplinarity* (Routledge: New York, 2010), 54.

¹⁸ Ibid.

¹⁹ Agger, “Critical Theory,” 105.

²⁰ Ibid., 106.

Positivists view their data as having no societal or cultural implications; therefore, positivists are passive and believe knowledge reflects the world as rational and real and nothing can change it. Relating this to society and culture, positivists take every social fact at face value and offer no attempt to investigate social facts to understand their origin and evolution. There are no implications.²¹

Agger uses critical theory, poststructuralism, and postmodernism to argue that societal and cultural implications exist.²² While Agger uses all three theories to defend his argument, his discussion on poststructuralism and postmodernism is integral of archival theory. Agger identifies poststructuralism as a theory of language and knowledge, like that set forth by Jacques Derrida, and postmodernism as a theory of history, society, and culture, like that set forth by Foucault.²³ Poststructuralism argued against structuralism. Founded in linguistics and popular in the mid twentieth century, structuralism focused on the intertextuality of texts, or how the creation of texts did not rely on the bias or background of the author but instead its relationships and discourse with other texts.²⁴ The structuralist movement consisted of two prominent figures. First, there was Ferdinand de Saussure, known as the father of linguistic structuralism in the early twentieth century; and then Claude Levi-Strauss, a major figure in the structural movement in anthropology during the 1940s.²⁵ Poststructuralism argued that texts have a deeper meaning identifiable through the realization that language is unstable and texts need to be broken down to understand their meaning. For example, the influence of the author affects the meaning of the text.²⁶ Postmodernism originated in the architectural field yet found great use in historical

²¹ Agger, "Critical Theory, 109.

²² Ibid.

²³ Ibid., 112.

²⁴ Moran, *Interdisciplinarity*, 76.

²⁵ R. Stasch, "Structuralism in Anthropology," *Encyclopedia of Language and Linguistics*, 2nd ed., vol. 12 (2006): 167-70.

²⁶ Moran, *Interdisciplinarity*, 84.

studies. Postmodernism emphasizes that grand narratives, or all-encompassing and comprehensive explanations, do not adequately describe the parts of societies. Instead, the past requires deconstruction into smaller stories that includes textual analysis and interpretation, as well as scientific investigation.²⁷ Postmodernism and poststructuralism are very similar because both emphasize Derrida's idea of deconstruction. Also, both poststructuralism and postmodernism, unlike positivism, examine social facts as phenomena created by a series of cause and effect factors. As mentioned earlier, positivists view facts as real and rational knowledge at face value and do not examine the underlying implications that created the facts. Positivists do not deconstruct knowledge to understand the meaning of facts and how they have changed or might change.²⁸

Deconstruction is an integral component to understanding how positivism is not sufficient in the areas of research and documentation. Agger states, "Deconstruction can help reveal the values and interests suppressed far beneath the surface of science. This politicizes and democratizes science by opening its text to outsiders, allowing them to engage with science's surface rhetoric more capably as well as to contest science's deep assumptions where necessary."²⁹ Deconstruction encourages interpretation and challenges the positivist ideals of reading and writing by incorporating the audience's and the author's bias. Postmodernists reject grand narratives in historical analysis. Instead, they understand that multiple perspectives apply to written records and thus examine various narratives from differing group affiliations, social classes, race, and gender.³⁰ These transformations in scholarly thought and research are integral to comprehending the evolution of archival theory and practice.

²⁷ Agger, "Critical Theory," 116.

²⁸ Ibid., 117.

²⁹ Ibid., 115.

³⁰ Ibid., 116.

The evolution of theoretical thought in the archival field shows a transition in power dynamics most notable through the dichotomy between positivism and postmodernism. Yet, before the introduction of postmodernist theories in the archival profession, there existed what archival scholars at present call the “classical approach.” Classical archival theorists relied heavily on positivist thought, a product of the Enlightenment with an emphasis on deductive reasoning, evident throughout the work of classical archival theorists, such as Samuel Müller, Johan Feith, Robert Fruin, and Hillary Jenkinson.³¹ Some outstanding features of their work are their commitments to the archival practices of arrangement and classification and their emphasis that the only written materials from Western governmental and educational institutions are worthy for preservation.

The importance of arrangement, classification, and written documents resonate in the combined work by Dutch and English archivists Müller, Feith, and Fruin titled, *Manual for the Arrangement and Description of Archive*.³² The *Manual* itself specifies 100 rules that identify the treatment of archival material. More specifically, the authors stress the importance of maintaining the original order of the archives received from their related administration. As stated in the *Manual*, an archival collection “is the whole of the written documents, drawings and printed matter, officially written or produced by an administrative body or one if it’s official, in so far as these documents were intended to remain the custody of that body or of that official”.³³ Therefore, defining records as being written and belonging to the original administrative body

³¹ Terry Cook, “What is Past is Prologue: A History of Archival Ideas Since 1898, and the Future Paradigm Shift,” *Archivaria* 43 (Spring 1997): 21.

³² Samuel Müller, Johan Adriann Feith, and Robert Fruin, “The Origin and Composition of Archival Depositories,” in *Manual for the Arrangement and Description of Archives*, trans. Arthur H. Levitt (New York: H. W. Wilson, 1968), 13.

³³ *Ibid.*, 13.

where there took place the original transaction documented by the records is of the upmost importance to classical archival theorists.

The *Manual* furthers its definition of the archival collection by breaking down its components. First, a collection is whole once it relinquishes ties with any other collection. A single document, in some cases, is a whole collection, because it contains no other parts and is itself secluded from any other collection. The authors then define the terms “written documents, drawings and printed matter.” Any material, according to the authors, that is not a textual document or a drawing such as a map or chart, cannot be part of an archival collection. The term “official” in this definition refers to documents created as a result of functions undertaken by administrative officials. The authors specify that personal letters do not have a place in the archival collection. The final component is that of the custody of materials in the collection. Documents and drafts of letters produced by the administration stay with that administration’s archives; however, letters or documents sent to other entities belong in the addressee’s archives.³⁴

Similarly, Jenkinson defines archives as, “the Office Documents (with annexures) which accumulate in the course of business, are kept more or less deliberately for reference, and thereafter survive in the custody of their original owners, or subsequent representatives of those owners, for any one of a number of reasons.”³⁵ Jenkinson continues his explanation of archives by indentifying five distinct qualities. First, archives are not collections but instead are accumulations, such that occur naturally and not through intentional action. Second, the use of archives differs greatly from the reason for their compilation. The original intent of archives did not take into consideration how future generations would use them. Third, custody is of great

³⁴ Müller, Feith, Fruin, “The Origin and Composition of Archival Depositories,” 14-18.

³⁵ Hilary Jenkinson, “The Classification and survey of English Archives,” in *Selected Writings of Sir Hilary Jenkinson*, ed. Rodger H. Ellis (Chicago: Society of American Archivists, 2003), 197.

importance in dealing with archives. The matter of custody lies in the authenticity of the archive along with the impartiality of archivist or researcher. Jenkinson believes that the creator of the records is the interpreter of the records and this interpretation should not be lost during the exchange of custody. Jenkinson's fourth quality emphasizes the importance of the origin of the records. Because archives represent an administration to which they once belonged, it is importance to understand the original routine of the administration in order to avoid false interpretation. Jenkinson's final point is that archives have an intimacy with the administration; therefore, one document of that administration cannot stand alone because it is part of a whole and requires a holistic perspective.³⁶

The *Manual* reiterates the above-mentioned qualities with its description of the creation of an archival collection. Here, the authors of the *Manual* compare archives comparison to a living organism, one that the archivist cannot control. Instead, the archivist merely witnesses its creation and studies it. The *Manual* stresses that its purpose is to explain the steps of acquiring a collection without subjecting it to the bias of the archivist. It remains vital that an archivist becomes knowledgeable about the collection and its administration before attempting arrangement and description. Each collection is unique and requires handling to meet its individual needs.³⁷ The role of the archivist remains in the background here. He/she remains silent in his/her work; an aspect Jenkinson discusses in a variety of his writings on archives and archival theory. Jenkinson believed that the archivist should not participate in appraising and selecting records, instead he believed appraisal and selection should be the job of the creator. He

³⁶ Hillary Jenkinson, "The Classification and survey of English Archives," in *Selected Writings of Sir Hilary Jenkinson*, ed. Rodger H. Ellis (Chicago: Society of American Archivists, 2003), 197-199.

³⁷ Müller, Feith, Fruin, *Manual for the Arrangement and Description of Archives*, 19.

perceived the archivist as a keeper or guardian of records and that the creator should appraise and select their own records for archival preservation.³⁸

The emphasis classical archivists put on the definition of archival materials as only being written documents that originate from western institutions, as well as their disregard of the role of the archivist in appraisal and selection, are both influences of positivist theory in archival practice. When dealing with Native American cultural materials in archives, these classical practices create conflicts because Native American tribes possess an oral history and not a written history. Their knowledge is therefore considered traditional, or esoteric. According to James D. Nason, esoteric knowledge is:

comprised of traditional valued knowledge that is capable of individual or group ownership in accord with established rules of property ownership. Some of this knowledge - information about medicine, technologies or oral accounts - may be highly systematic and cumulative in nature. It may be specifically owned or held in trust by a group or an individual representing and acting on the community's behalf. Other esoteric knowledge (such as certain types of songs or chants) may be specifically created or otherwise owned by an individual and singularly passed on in inheritance to descendants.³⁹

Esoteric knowledge falls under the category of traditional knowledge because it originated before Western interaction and the establishment of Western law in North America; therefore, not only does it not consist of written documents, but it also does not originate from a Western institution. These facts prove detrimental to Native Americans because in accordance with positivist archival theory, their cultural heritage is not worthy of archiving⁴⁰.

Tom Nesmith, Terry Cook, and Joan M. Schwartz discuss how postmodernism altered archival practice. According to Tom Nesmith, postmodernism implies, “that whatever improvement in understanding we may be able to achieve can only come from identifying and

³⁸ Cook, “What is Past is Prologue,” 23.

³⁹ James D. Nason, “Traditional Property and Modern Laws: The Need for Native American Community Intellectual Property Rights Legislation,” *Stanford Law and Policy Review* (Spring 2011), 259.

⁴⁰ Ibid.

exploring as many of the mediating factors as possible, even those seemingly most remote from such previous study, such as archiving.”⁴¹ Therefore, no longer is the formation of knowledge reliant on deductive reasoning as in the positivist movement, but instead there exists numerous influences that aid in the construction of knowledge and memory. This view drastically changes the role of the archivist in preserving human memory and interpreting history. He furthers his explanation with the importance postmodernism has on archives and the archivist. He states, “the postmodern view of communication throws light on the role of archivists as key mediators or constructors of the knowledge available in archives.”⁴² Communication being brought to the forefront of understanding and knowledge allowed scholars to question how the past communicated with the present. The archivists play a role in the creation of archives and societal memory evident in their duties of contextualizing cultural texts, or re-creating them through the attempts of preserving them. This process of contextualization, their interpretation of what is important, dictates their selection and appraisal process. The archivists decides what is important to maintain in the archives, they present it to the public in ways they determine are intelligible, they allow access, preserve the records, decided what is to be retained years later, and use modern technology to present archival holdings on an advanced level.⁴³

Cook specifies the need for modern archivists to acknowledge their interpretive and active presence in archives, which include the practices of selection and acquisition.⁴⁴ Through selection and acquisition, Cook acknowledges the archivist’s part in influencing the construction of collective memory. Furthermore, Cook stresses that archivists can only understand their roles

⁴¹ Tom Nesmith, “Seeing Archives: Postmodernism and the Changing Intellectual Place of Archives,” *American Archivist* 65 (Spring/Summer 2002): 26.

⁴² *Ibid.*, 26.

⁴³ *Ibid.*, 31.

⁴⁴ Cook, “What is Past is Prologue,” 20-22.

in the present by studying their role in the past.⁴⁵ An important element in his work is his emphasis that positivist theories, which focused on documenting facts while deemphasizing the importance of interpretation and concepts, began to deteriorate in the twentieth century.⁴⁶

The postmodern perspective in archives shifted the power dynamics in the practice of archiving. Joan M. Schwartz and Terry Cook continue the argument that archivists do not play a passive role in society. Instead, they argue that “archives are established by the powerful to protect or enhance their position in society. Through archives, the past is controlled.”⁴⁷ This direct correlation of archives to power presents new perspectives on memory formation and social identity.

Cook also emphasizes archival appraisal as a great silence between archivists and researchers. He states, “the major act of historical interpretation occurs not when historians open boxes but when archivists fill the boxes, by implication destroying 98 percent of records that do not make it into those or any other archival boxes.”⁴⁸ Once again, Cook represents the archivist as an active and somewhat aggressive player in selecting the materials that become the basis for historical accounts and collective memory. He continues by explaining that a society cannot define its past based solely on the archival materials left behind by those in power, but also on the archivist and his/her role in selecting and appraising those materials.⁴⁹ This explanation is similar to the earlier discussion of poststructuralism and deconstruction and the numerous layers of texts. In order to develop a deeper understanding of society’s past, it is important to

⁴⁵ Cook, “What is Past is Prologue,” 19.

⁴⁶ Ibid., 25.

⁴⁷ Joan M. Schwartz and Terry Cook, “Archives Records, and Power: The Making of Modern Memory,” *Archival Science* 2 (2002): 1.

⁴⁸ Terry Cook, “Remembering the Future: Appraisal of Records and the Role of Archives in Constructing Social Memory,” in *Archives, Documentation, and Institutions of Social Memory, essay from the Sawyer Seminar*, ed. Francis X. Blouin Jr. and William G. Rosenberg, (Ann Arbor: University of Michigan Press, 2007), 171.

⁴⁹ Ibid., 173.

acknowledge that more materials existed at one point and the archivist had a role in what remained for research.⁵⁰

While postmodern ideals continue to become prevalent in the archival profession, practices of positivism still remain evident in current codes of ethics of archives. Positivism greatly benefits Western society's various cultural practices, such as recording history and ownership through copyright; however, the practice of positivism does not support non-Western societies because non-Western societies embrace an oral approach to recording the past and communal ownership. The failure of positivism to accommodate the needs of cultures based on orality creates dilemmas in their gaining ownership of their intellectual property.

Thesis Structure

The following chapters in this thesis argue that archival theory and practice follow Western conceptions of laws and ethics, resulting in Native American cultures' losing control of the access to and ownership of their sensitive traditional expressions and knowledge. Determining ownership of archival materials through copyright laws is difficult, especially when dealing with non-western cultures. Copyright and positivism, which undergo discussion in Chapter Two, created a tool of oppression that continues to create ownership conflicts for Native American cultural materials in the twenty-first century.

Technological innovations in digitalization and file sharing furthered the ownership conflicts by allowing public access to digitized sensitive Native American cultural materials. This Digitization, while first a threat to Native American sensitive materials in archives, acted as a catalyst for Native American activism and advocacy for the digital return of their intellectual property. This thesis argues that while Native Americans have suffered with the loss of control of their cultural materials because of Western copyright and positivist practices, they currently use

⁵⁰ Cook, "Remembering the Future," 173.

digital tools of Western society to promote their ideals and reclaim their cultural heritage through digital repatriation.

Chapter Two provides an analysis of past scholarly works on the subject of archives and Native American cultural and intellectual property rights. Chapter Three discusses the invention of copyright law in Western society, its evolution, and its correlation with Western positivism and its implications for indigenous cultures. Chapter Four focuses on the development of archival ethics and how the Protocols of Native American Archival Material and the United Nations Declaration on the Rights of Indigenous Peoples tried to implement change. Chapter Five explains how Native Americans use Western concepts of digital technology to create change through collaboration with Western institutions of memory. Native Americans are currently taking steps to claim their intellectual property, promote new legislation, and advocate digital repatriation practices through interactive workshops, digital repository projects, and websites. Finally, Chapter Six, the conclusion, emphasizes a shift in perspective for Native American cultures. While Native American cultures were reliant on oral traditions of communication, they realized that their culture and language were at risk because of the lack of documentation. Currently, through the use of digital technology, Native American cultures are collaborating with Western institutions as a means to save their heritage, regain control of their traditional knowledge and expressions, and revitalize their cultural practices.

CHAPTER 2

VOICES AND DISCUSSIONS: AN EVALUATION OF SCHOLARSHIP

Scholars and academics in the past twenty years have produced a great deal of academic discourse on the topic of Native American cultures and their intellectual property rights. This thesis takes on an interdisciplinary approach to identify, interpret, and understand the conflicts between Western approaches and Native American approaches to preserving and making accessible cultural materials, while it also recognizes the technological and collaborative advances through digital repatriation that a number of Native American cultures strive for in the twenty-first century. This review of scholarship examines the discussions on Native American intellectual property in archives. Common themes throughout the works written on the topic include ethics, copyright law, and collective memory.

Ethics are standards of right and wrong created by society to direct human behavior in a way that is beneficial to society based on virtues, obligations, and fairness. Professional ethics apply to the obligations and responsibilities of specific professions, such as the archival profession.¹ Ethics is not a new concept to archival practice, yet, the scholarship involving archival ethics, particularly in regard to indigenous cultures and their materials, is relatively new. For instance, Karen Benedict published a book through the Society of American Archivists (SAA) in 2003 titled *Ethics and the Archival Professions: Introduction and Case Studies*. Her work provides an excellent reference for the establishment of professional ethics in organizations, especially the SAA. Benedict specifies the need for codes of ethics in organizations, their roles in organizations, and what characteristics professional ethics derived

¹ Kay Mathieson, "A Defense of Native Americans' Rights over Their Traditional Cultural Expressions," *The American Archivist* 75 (Fall/Winter 2012): 458-459.

from the philosophical study of ethics.² With the fundamentals of archival ethics identified and a comparison made between laws and ethical codes, Benedict finishes her work by providing forty case studies of ethical concerns in archives. These case studies allow archivists to question their perspectives and reevaluate their ethical stances.

The book evaluates the revised 1992 version of the *Society of American Archivists' Code of Ethics for Archivists* and uses synopsis of fictional archival situations in order to, as stated by Benedict, “promote discussion in classrooms and in workshops about the profession’s ethical principles, rules of professional conduct, and suggested institutional best practices.”³ The intention of this book is to educate those either pursuing careers in the archival profession or continuing their archival education to stay up to date on archival practice. While the book provides detailed examples and ends with an extensive commentary on the *Society of American Archivists' Code of Ethics for Archivists*, it fails to comment on one prevalent concern and topic of debate in the archival field, that of Native American ethical concerns. Written in 2003, Benedict’s work makes no mention of indigenous cultural materials and how to handle ethical conflicts that arise with housing sensitive materials. This exclusion did not go unnoticed by critics.

In “A Defense of Native Americans’ Rights over Their Traditional Cultural Expressions,” Kay Mathiesen notes the lack of attention Native American archival materials receive in archival scholarship on ethics. To be more specific, not only does Mathiesen point out the neglect of ethical concerns regarding Native American intellectual property in Benedict’s work, but she also acknowledges their exclusion in *The Ethical Archivist* (2010) by Elena Danielson and in *Archives and the Public Good: Accountability and Records in Modern Society* (2002) by Richard

² Karen Benedict, *Ethics and the Archival Professions: Introduction and Case Studies* (Chicago: Society of American Archivists, 2003):1.

³ Ibid., 21.

J. Cox and David A. Wallace.⁴ Mathiesen, in common with Benedict, provides an explanation of ethics and the place ethics have in professional organizations such as the SAA; however, Mathiesen's work specifically addresses Native American needs. The argument in her work is that current codes of ethics in archival institutions require reevaluation to acknowledge that Native American communities possess moral rights over their traditional cultural expressions (TCE) and traditional knowledge (TK), as well as the right to determine access to such materials.⁵

Mathiesen does not suggest policy proposals or law reform and does not claim to speak on the behalf of Native American tribes; instead, she aims to find a common ground and understanding between Western approaches to preserving history and the needs of indigenous tribes. To provide readers with a better understanding of the argument and discussion at hand, Mathiesen includes a short history of Native American cultural appropriation at the hands of Western society. Following this brief history, Mathiesen presents a summary of the Protocols for Native American Archival Materials (PNAAM), including the controversies they create, possible ethical solutions to, and where the solutions fall short. Also, she incorporates a discussion of the sensitivity of the subject and how implementing change to accommodate Native American cultures may lead to access restrictions throughout archives across the nation.⁶ The perspective presented in this work is unique because of the neutral stance Mathiesen uses in judging both the Western and Native American side of the dilemma.

Randall C. Jimerson presents a comprehensive work that examines the role of archival power in relation to memory and ethics in his work *Archives Power: Memory, Accountability, and Social Justice*. Jimerson highlights the contradictions apparent in the archival profession by

⁴ Mathiesen, "A Defense of Native Americans' Rights," 459.

⁵ Ibid., 461.

⁶ Ibid.

examining its various actions, such as preserving some records while destroying others and allowing access to some records, while also restricting others. Here, there is evidence of a turn in archival perception. In common with Cook, Jimerson discusses the transition from the classic view of the archive and the archivist as unbiased and passive sentinels who guarded archival materials to the postmodern view of the archivist and the archive as performing an active role in the forming of memory, establishing control of access, and interpreting the past.⁷

His work references numerous concepts that Cook and Schwartz examined in their work, but his work sets itself apart with the inclusion of ethical revaluation. Specifically, Jimerson takes into consideration the implications of Western archival institutions of thought on indigenous societies in the conclusion of his work, “Rethinking Archival Ethics.” Jimerson begins his discussion of archival ethics and the role that ethics play in indigenous societies, such as the fall of the apartheid in South Africa and the establishment of an indigenous archive in South Africa.⁸ He comments, “no longer seen as neutral and passive centers for historical documentation, archives would be reborn as active participants in the social, political, and intellectual struggles to achieve social justice and personal freedom for all peoples.”⁹ Jimerson then addresses the evolving concepts of archival ethics, particularly in relation to multiculturalism and the effects of societal unrest during the last decade of the twentieth century.¹⁰ The need for archivists to reevaluate their ethics is integral in order to create an archival vision that balances political and ethical factors when handling, appraising, interpreting, and making accessible cultural materials.¹¹ *Archives Power* reiterates the power dynamics

⁷ Randall C. Jimerson, *Archives Power: Memory, Accountability, and Social Justice* (Chicago: Society of American Archivists, 2009), 3.

⁸ Ibid.

⁹ Ibid., 342-343.

¹⁰ Ibid., 343.

¹¹ Ibid., 354.

discussed by Cook, as well as the transition to postmodern archival theory, but the significance of Jimerson's work for this thesis lies in the author's evaluation of archival professional ethics in regard to Native American cultures. Jimerson highlights the losses Native American cultures have suffered because of colonization, which included the loss of their history, collective memory, and identity. Also, Jimerson makes note of the conflicts in current ethical codes and the impact the codes have on Native American cultural heritages and identities, when he states, "These oral tradition cultures produced few written records, and anthropologists, ethnographers, the Bureau of Indian Affairs, and other federal and state agencies have long controlled the archival documentation of their heritage."¹² In addition, Jimerson discusses PNAAM and promotes its initiative to grant control members of Native American cultures control over their intellectual property. Overall, he calls upon archivists to examine their ethical stance and view archiving through the perspective of marginalized cultures.¹³

Native American cultures and Western institutions long have debated the conflict between the ownership of TCE and TK and copyright and intellectual property laws. As mentioned previously, many forms of indigenous intellectual property fall under the category of traditional expressions and knowledge and, therefore, do not receive protection from copyright law. Numerous anthropologists, native activists, and legal scholars advocate copyright reform in order to protect indigenous intellectual property, especially intellectual property that has entered the public domain.¹⁴

Intellectual property, its definition, and laws related to it, are in constant debate with ethics. These debates created a new discourse on intellectual property and human rights. Megan M. Carpenter, scholar and professor of human rights, states,

¹² Jimerson, *Archives Power*, 354-355.

¹³ Ibid., 357-358.

¹⁴ Michael F. Brown, "Can Culture Be Copyrighted?," *Current Anthropology* 39 no. 2 (April 1998): 193.

It is true that intellectual property laws are based on Western, developed markets, Western concepts of creation and invention, and Western concepts of ownership. But whatever their origins, those laws have been, and currently are, the primary vehicle for the protection of artistic, literary, and scientific works worldwide. To segregate indigenous interests from this international legal regime, particularly in light of the increasing globalization of markets, is to deny indigenous peoples both a powerful legal shield and a powerful legal sword.¹⁵

Carpenter realizes the importance of global copyright laws; however, she also stresses the importance of the inclusion of indigenous perspectives that will allow native tribes to protect their cultural heritage and identity. Carpenter calls for a global change in copyright that includes, “the incorporation of collective and communal notions of authorship, the expansion of the originality requirement to reflect these forms of authorship, and the application of limits on the duration of copyright protection in a broader community context.”¹⁶

Carpenter relates intellectual property law to a machine that needs to be remodeled to incorporate indigenous cultural knowledge. Instead of highlighting the inequalities of intellectual property rights and the oppression of Western society, Carpenter presents a proposal for change by discussing how intellectual property law can be adjusted to fit a global agenda.¹⁷ More importantly, she addresses the subject of globalization. Perspectives yet to be considered are legal systems that pertain to widespread digitization and globalization. Carpenter stresses, that first, “Intellectual property law is a dynamic body of law that has a history of adapting to evolving conceptions of works and their protectorate,” and second, “theorists and practitioners must advocate conforming the law to the needs of a global community.”¹⁸ If a global copyright is

¹⁵ Megan M. Carpenter, “Intellectual Property Law and Indigenous Peoples: Adapting Copyright Law to the Needs of a Global Community,” *Yale Human Rights & Development* (2004): 51.

¹⁶ *Ibid.*, 54.

¹⁷ *Ibid.*, 53.

¹⁸ *Ibid.*, 77-78.

the goal, legal systems need to adapt their laws in the wake of globalization in order to protect all cultures and their traditional knowledge.

Carpenter presents her argument bluntly and advocates change; however, the question arises as to whether TCE and TK can, in fact, fall under copyright protection. Michael F. Brown addresses this issue in two works, “Can Culture Be Copyrighted?” which critically examined movements for copyright reform and, *Who Owns Native Culture?*, which offers a global perspective on the problems facing indigenous peoples, Western practices of copyright law, and how culture became a commodity.¹⁹

Brown offers a different perspective on the discussion of Native American intellectual property rights in his complex article, “Can Culture Be Copyrighted?” This article stands out due to his critical critique on Native American intellectual property reform and how he finds the concept of cultural appropriation “disturbing.”²⁰ Brown contends that the debate on the appropriation, or unethical possession, of cultural materials, threatens the law of free information in a corporate-dominated society. He stresses that the prevention of cultural appropriation and establishment of culture as property would further corporate gain and limit the rights of freedom to the general public.²¹ Brown argues that the debate for intellectual property reform to include special restrictions for Native American cultural information is a romanticized endeavor because it does not address reality. If the United States government granted Native Americans special restrictions on their cultural materials, where would such restrictions end? What of other minority cultures? Would, they too, receive special restrictions on their cultural materials?²²

¹⁹Michael F. Brown, *Who Owns Native Culture?* Cambridge, Massachusetts: Harvard University Press, 2003: 4.

²⁰ Brown, “Can Culture Be Copyrighted?” 203.

²¹ Ibid.

²² Ibid., 195.

The article begins with a discussion of the evolving relationship between Native Americans and Western institutions that resulted in new legislation, such as the U.S. Native American Graves Protection Act (NAGPRA). Brown discusses a shift in the way individuals recognize culture and cultural information that enables ethnic groups to equate culture with property and thus to call for protection under copyright law.²³ Brown then dissects and critiques this new perception of culture in order to present his argument, as he states:

The debate over intangible cultural property as it had been conducted by anthropologists, legal scholars, and indigenous activists has tended toward a polemical romanticism that produces memorable bumper-sticker slogans ('Give the natives their culture back!') but little in the way of sober reflection on the difficult balancing act required to formulate policies that provide reasonable protection for minority populations while maintaining the flow of information essential to liberal democracy.²⁴

With this argument, Brown sets out to prove that the debates on Native American intellectual property rights are too narrow, romanticized, and passionate to produce legal reform.²⁵

Brown's article provides a broad interpretation of the intellectual property debate and scrutinizes its various elements in sections. His work allows readers to understand the various factors at stake when advocating change in a system of legislation that has been established for hundreds of years.

In *Who Owns Native Culture?*, Brown addresses a variety of questions:

To what extent can law control the movement of ideas? Does it make sense for ethnic groups to define their cultural practices as property that cannot be studied, imitated or modified by others without permission? How far can democratic states go to provide indigenous peoples with cultural protections without violating the rights of the general public? What is the future of the public domain, which is squeezed on one side by the privatizing logic of the world's corporations and on the other by native-rights activists promoting novel forms of collective copyright?²⁶

²³ Brown, "Can Culture Be Copyrighted?" 194.

²⁴ Ibid., 195.

²⁵ Ibid.

²⁶ Brown, *Who Owns Native Culture?* 7.

Brown addresses these questions through case studies. His work consists of legal cases around the globe that involve indigenous cultures fighting cultural appropriation. Brown dissects each case to reveal the complexities between ethics and law.²⁷ While reading each case study, the arguments from his first article resonate on the pages. Brown continues to advocate that any change in intellectual property law to protect indigenous culture will ultimately affect the global community's access to information.²⁸

What differentiates this work from Brown's first article is his proposed solution for legal conflicts. He uses a term called "imaginative realism," which he defines as "a willingness to accept a degree of imperfection in the interest of balance."²⁹ Through imaginative realism, Brown argues that an agreement is possible between indigenous societies and liberal democracies and their institutions based solely on collaboration.³⁰ These components allow Brown's work to stand out because he acknowledges the consequences to copyright reform, such as the threat of corporate monopolies, a topic the other scholars fail to address.

Expounding on the use of communication as a tool is Kimberly Christen. In her work, "Opening Archives: Respectful Repatriation," Christen acknowledges that digital technologies introduce both benefits and problems for aboriginal cultures. She states, "[w]hile digital technologies allow for items to be repatriated quickly, circulate widely, and annotated endlessly, these same technologies pose challenges to some indigenous communities who wish to add their expert voices to public collections and also maintain some traditional cultural protocols for the viewing, circulation, and reproduction of some materials."³¹ Christen is an ethnographer and a

²⁷ Brown, *Who Owns Native Culture?* 9.

²⁸ *Ibid.*, 59.

²⁹ *Ibid.*, 8.

³⁰ *Ibid.*, 9.

³¹ Kimberly Christen, "Opening Archives: Digital Repatriation," *The American Archivists* 74 (Spring/Summer 2011): 185.

cultural anthropologist who has experience in digital repatriation projects for aboriginal cultures in the United States and Australia. To overcome the challenges of digital technologies, she aided in the establishment of digital archives for the Warumunga Aboriginal community located in Central Australia as well as a number of Pacific Northwest Native American cultures.³² These digital archives allowed the establishment of varying levels of access to the materials based on specific cultural needs. For example, the Mukurti Wumpurrarni-kari Archive allowed the Warumunga people to have personal control over their digitized cultural materials. Not only did the archive allow repatriation and sharing, it also allowed Warumunga community members to control who can see what. These sharing protocols are very unique and receive fuller explanation in Chapter Five.³³

Christen's article discusses the advancements achievable through digital archiving. This thesis embraces postmodern ideas of archiving, along with poststructuralist ideas on the formation of knowledge. Postmodernism and poststructuralism reveal how copyright and the positivist formation of knowledge create complications for Native American cultures in regard to their intellectual property rights in archives and other institutions of memory. This thesis argues that through the advocacy of ethical and legislative reform, Native American cultures find a voice through use of Western digital technologies to reclaim their cultural materials and promote their identities.

³²Ibid., 185.

³³ Ibid., 186.

CHAPTER 3

ORIGINS OF COPYRIGHT

The establishment of copyright law in the United States has its roots in the laws of England. The beginnings of copyright has roots in both fifteenth century Venice with the granting of printing privileges and the development of authors' rights in 1791 and 1793 in France. Yet, this chapter discusses the evolution of copyright law in England¹. Also addressed are the influences English copyright law had on United States copyright law, how U.S. copyright law relates to positivist ideals, and the effects of copyright law and positivism on Native American intellectual property rights.

It is important to understand the history, evolution, and meaning of past and current copyright laws to understand the effects U.S. Copyright Law has on Native American cultures. Currently, the United States Copyright Office defines copyright as:

a form of protection provided by the laws of the United States for original works of authorship, including literary, dramatic, musical, architectural, cartographic, choreographic, pantomimic, pictorial, graphic, sculptural, and audiovisual creations. "Copyright" literally means the right to copy. The term has come to mean that body of exclusive rights granted by law to authors for protection of their work. The owner of copyright has the exclusive right to reproduce, distribute, and, in the case of certain works, publicly perform or display the work; to prepare derivative works; in the case of sound recordings, to perform the work publicly by means of a digital audio transmission; or to license others to engage in the same acts under specific terms and conditions. Copyright protection does not extend to any idea, procedure, process, slogan, principle, or discovery.²

The U.S. copyright office takes special note of the author and the obligation of copyright law to protect the author's property. Here, the author and his/her works are the most important factor;

¹ Martine Kretschmer, Lionel Bently, and Ronan Deazley, "Introduction. The History of Copyright History: Notes from an Emerging Discipline," in *Privilege and Property: Essays on the History of Copyright*, ed. Ronan Deazley, Martin Kretschmer, and Lionel Bently (Cambridge: Open Book Publishers, 2010), 2.

² United States Copy Right Office, "A Brief Introduction and History," United States Copy Right Office, <http://www.copyright.gov/circs/circ1a.html> (accessed September 8, 2013).

however, this has not always been the case. Copyright law embraces a long and complex history of economic influence, governmental censorship, and philosophical ideologies.³

The development of copyright law is closely related to the technological innovations that aided in printing and publishing. This is not to say that a sense of copyright did not exist prior to the invention of the printing press. In ancient Rome and Greece, the idea of copyright protection is said to have existed because of the dishonesty associated with plagiarism, the selling of works for personal profit, and the awareness of moral and intellectual interests that authors had over their written works. These features of copyright existed merely in a standard of respect and were never written into any form of legislation.⁴ However, copyright, as stated by Mark Rose, “the practice of securing marketable rights in texts that are treated as commodities – is a specifically modern institution, the creature of the printing press, the individualization of authorship in the late Middle Ages and early Renaissance, and the development of the advances marketplace society in the seventeenth and eighteenth centuries.”⁵

Numerous scholars argue that the beginning of copyright law stems from the Statute of Anne in 1710; however, 150 years of previous guilds and legislations led up to the formation of this Statute. According to Lyman Ray Patterson in his work *Copyright in Historical Perspective*, there are three integral components that set the precedent for the Statute of Anne. These components included “the stationer’s copyright, the printing patent, and government press control.”⁶ Following the introduction of the printing press to England, those in power saw the potential for economic gain as well as political power in controlling the printing of literary works. The printing patent was the first form of government regulation in the form of copyright;

³ Lyman Ray Patterson, *Copyright in Historical Perspective* (Nashville: Vanderbilt University Press, 1968), 19.

⁴ UNESCO, *The ABC of Copyright* (UNESCO: Paris, 1983), 12.

⁵ Mark Rose, *Authors and Owners: The Invention of Copyright* (Cambridge: Harvard University Press, 1993), 2.

⁶ UNESCO, *The ABC of Copyright*, 12.

however, it is important to emphasize that the term “copyright” was not used prior to 1701. Even after 1701, the term appeared in only two records.⁷ “Copyright” in this era meant the right to copy. Prior to the introduction of the term, the government used a printing patent to regulate the creation of published works. These patents granted printers rights to print certain texts.⁸ Some of these texts include school books, prayer books, and the Bible.⁹ The book trade continued to expand, resulting in the creation of a guild in order to establish protection for the trade as well as stability.¹⁰ In 1557, through a royal charter, the guild became the Company of Stationers of London, also referred to as the Stationer’s Company.¹¹

Stationer’s copyright originated from the Stationer’s Company and did not include or require any involvement with the common-law courts. This form of copyright was private and resided and applied to the Stationer’s Company and its published works. With this form of copyright, the author of a work could only print, publish, and sell within the company’s written guidelines and ordinances. Moreover, the company owned all portions of the book trade, which included printers, booksellers, and book binders. Because the authors were not members of the company, they legally did not own the copyright of their written works. Stationer’s copyright was a monopoly that reflected the stationer’s goal of making a profit. It is important to note that the authors had no individual ownership over their works during this point in time. Instead, the Stationers owned the individual works of authors. The concept of individual ownership by the author and the author as a professional develop after the 1710 Act on Anne.¹²

⁷ UNESCO, *The ABC of Copyright*, 12.

⁸Paul Torremans, Uma Suthersanen, and Lionel Bently. Eds., *Global Copyright : Three Hundred Years Since the Statute of Anne, From 1709 to Cyberspace*. Cheltenham, UK: Edward Elgar, 2010: 9-17, *eBook Collection (EBSCOhost)*, EBSCOhost (accessed September 17, 2013).

⁹ Patterson, *Copyright in Historical Perspective*, 5.

¹⁰ Torremans, Suthersanen, and Bently, *Global Copyright*, 17.

¹¹ Patterson, *Copyright in Historical Perspective*, 4.

¹²*Ibid.*, 5, Rose, “Authors and Owners,” 4.

During the seventeenth century, Parliament began to become more involved with printing regulation by issuing the Licensing Act of 1662 that renewed the power of the Stationers Company. The Licensing Act received renewal up until the revolution of 1688, which caused the act to expire in 1695. The Stationers Company suffered from the lack of political backing as new ideas about rights of the author and the freedom to publish began to arise.¹³ During the period following the expiration of the Licensing Act of 1688, John Locke introduced a new philosophical movement based on the ideals of liberalism. Locke promoted inalienable human rights, such as freedom of the press. This freedom allowed protection from legal consequences and emphasized the need for legislation to protect the author's works from copying. Rose elaborates on Locke's liberal discourse: "the key to Locke's thought was the axiom that an individual's 'person' was his own property. From this it could be demonstrated that through labor an individual might convert the raw materials of nature into private property."¹⁴ A proponent of these ideals was Daniel Defoe, author of *Robinson Crusoe*. Prior to writing his classic work, Defoe authored a *Weekly Review* that promoted Locke's philosophical liberalism. Defoe's support promoted wide circulation of the idea of individual authorship and protection for authors. This new movement threatened the Stationers, who wanted to return to a system of publishing over which they had sole control.¹⁵

Following fifteen years of no new legislation replacing the Licensing Act, the British Parliament enacted the Act of Anne in 1710. While this act is not a copyright law comparable to twenty-first century's standards, it is integral to this discussion because U.S. copyright law

¹³ Torremans, Suthersanen, and Bently, *Global Copyright*, 17-18.

¹⁴ Rose, "Authors and Owners," 5.

¹⁵ Torremans, Suthersanen, and Bently, *Global Copyright*, 18.

because it provided the foundation for the development of U.S. Copyright Law in 1790.¹⁶ The act was not a new piece of legislation; instead it reestablished order for the book trade because the Licensing Act failed to be renewed in 1695. However, it did function to better the plight of the authors by creating the idea of authors having ownership of their written works. The Act of Anne created a system of legislation that worked with both the publisher and the author. As Lionel Bently describes, “The Act conferred protection on existing work for twenty years. It was conceived as a device that would prevent other booksellers from copying those published works. It was not, primarily, a mechanism for recognizing ‘authorship’, even if it was expressly directed at ‘the encouragement of learned men to compose and write useful books.’”¹⁷ The idea of authors having copyright became a topic of discussion and contention between monopolist booksellers and authors. First, booksellers unsuccessfully fought for copyright to be a perpetual law assigned to both the author and the publisher so they could both receive benefits. Booksellers attempted to restore their hold on copyright once more in the case *Millar v. Taylor* (1769). In this case, booksellers argued that if authors failed to retain the copyright after publication, the authors would lose all profit. In addition, authors also would lose all control over their work including printing, correcting, preventing new editions, and preventing pirating. In short, the ruling was that a perpetual common law copyright existed for the benefit of the booksellers and authors could not retain copyright for their works after certain allotted amounts of time. If authors could not renew their copyright, their works went back to the booksellers. There was no public domain in existence.¹⁸ The booksellers won this case; however, it was overturned in 1774 with the case *Donaldson v. Beckett* due to the realization that the booksellers had a major monopoly. This case

¹⁶ Allen Kent and Harold Lancour eds., *Copyright: Current Viewpoints on History, Laws, Legislation* (New York: R. R. Bowker Co., 1972), 2.

¹⁷ Torremans, Suthersanen, and Bently, *Global Copyright*, 9.

¹⁸ Kent and Lancour, *Copyright: Current Viewpoints*, 45-46.

resulted in copyright being granted to the author of the work, while also ensuring protection for the common law until it became published and once published, the protection of the author was in accordance with the Act of Anne.¹⁹

As previously mentioned, the Act of Anne laid the foundation for American copyright law in the Copyright Act of 1790, which provided protection for books, charts, and maps.²⁰ This act carried the same meaning as the original Act of Anne until a case similar to that of *Donaldson v. Beckett*, *Wheaton v. Peters* (1834) granted copyright to authors. The beginning of copyright law proved complicated for the U.S. because the U.S. had no historical precedent for its copyright law and U.S. copyright law underwent numerous revisions between 1790 and 1909.²¹ Following the revisions made in 1909, there were ten substantial revisions made up until 1976 that slowly began to incorporate the products of technology such as photographs, film, art, and sound recordings. After 1976, there were still more revisions; however, the most important of these revisions included the Digital Millennium Copyright Act of 1998. This copyright act, according to the U.S. Copyright Office,

provided for the implementation of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty; limited certain online infringement liability for internet service providers; created an exemptions permitting a temporary reproduction of a computer program made by activating a computer in the course of maintenance or repair; clarified the policy role of the Copyright Office; and created a form of protection for vessel hulls.²²

Copyright Law in the United States affects Native American cultures because of its emphasis on the author and individual ownership. Nason describes affects in greater detail:

Native American intellectual property is at risk today because Western concepts of copyright apply to little of it. Copyright laws such as those in the United States are

¹⁹ Kent and Lancour, *Copyright: Current Viewpoints*, 46.

²⁰ UNESCO, *The ABC of Copyright*, 15.

²¹ *Ibid.*, 32.

²² United States Copy Right Office, "A Brief Introduction and History-Notable Date in United States Copyright," United States Copy Right Office, <http://www.copyright.gov/circs/circ1a.html> (accessed November 10, 2013).

essentially a governmentally assigned grant of exclusive rights to an individual creator over the use, reproduction, alteration, and performance of what he or she has created, provided that his or her creation can be expressed or recorded in some tangible, fixed form or medium. These creations must be "original" and not taken from the work of another. Nor does copyright extend to ideas or concepts, names or titles, or designs that are commonly used. Further, there are temporal limits to these rights (currently the creator's lifetime plus seventy years in the United States) that place the property in the public domain upon expiration (17 U.S.C. § 106).²³

As mentioned in the introduction, Native American knowledge is esoteric, meaning it existed prior to Western influence. Also, esoteric knowledge implies that an individual creator or author does not exist, mainly due to the orality of Native American cultures. U.S. copyright and the idea of the author simply do not apply to Native American lifestyles and culture heritage. Lyman ray Patterson argues that:

The law of copyright is thus the law that helps to shape the culture of our society, for it is a major factor in determining what books we read, what art we enjoy, what music we hear. Without the protection copyright gives to the creator and the entrepreneur, there would be little incentive to create and disseminate the works that constitute the repository of our learning and culture.²⁴

This statement is true and is a major factor in the plight of Native American's losing control of their cultural heritage and its interpretation. This depiction of copyright also presents positivist ideas of the creation of knowledge and learning. As mentioned in the introduction, positivism placed the creation of knowledge in an empirical and scientific formula. With this formula, humankind can create knowledge through the sciences and can understand human culture by applying empirical methods of research to human society. More importantly, positivist theory needs a written history of facts, which copyright promotes.²⁵ Positivist theories worked well with copyright recognizing the author as creator. While the creation of copyright as an author's right occurred before positivist ideologies became popular with researchers, the two nearly overlap with in the late eighteenth century and the latter occurring in the mid-nineteenth century. With

²³ Nason, "Traditional Property and Modern Laws," 259.

²⁴ Kent and Lancour, *Copyright: Current Viewpoints*, 43.

²⁵ Moran, *Interdisciplinarity*, 54-55.

the protection granted to authors with their written works, copyright shaped culture and the way society learns.

How U.S. copyright and positivism define U.S. culture is not applicable to Native American cultures because they are oral cultures based on communal ownership. Native American cultural materials were deemed unworthy for preservation by classic positivist archivists because their history was neither written nor Western. Adding the idea of the author and individual ownership only intensified the exclusion of Native American culture. The problem lies in identifying solutions to this dilemma of Native American intellectual property rights. How does one alter legislation that is centuries old? The answer lies in the development of ethical reform in institutions to incorporate the needs of Native American cultures in a Western-dominated nation.

CHAPTER 4

ARCHIVAL ETHICS: FOUNDATIONS AND REFORM

The rise of professional ethics and the establishment of codes of ethics in organizations reached a height in the late nineteenth and early twentieth centuries. Codes of ethics legitimized professional organizations in regard to their creating a social contract of obligation with the public. Such codes offered, and continue to offer, guidance to group members so that they better understand their moral obligations and how to handle their responsibilities in a professional manner. Ethical codes juggle conflicts and concerns among values, societal pressures, and the realities of the work environment; however, ethical codes also create a rift between laws and morals because in many cases what the codes label unethical may not be illegal. Ultimately, the establishment of an ethical code within a company is daunting, although necessary.¹

Karen Benedict elaborates on the importance of professional ethics and its place in organizations; but first she highlights the difference between “professional ethics” and “ethics” in general. Benedict stresses that “ethics” derives from the philosophical study of morality and the norms that constitute moral behavior. Professional ethics consist of two different approaches, the deontological and the teleological. Through deontology, professionals addressed ethical concerns as what actions are wrong or right. With the perspective of teleology, professionals judge the action by its end or result. For example, a teleological ethicist may label a wrong act good if the result was positive. In the field of professional ethics, professionals combine these two approaches to produce the best possible outcome.²

In order to grasp the complications of these two ethical perspectives for Native American archival material, each term needs to be defined and put into context. First, deontology is an

¹ Benedict, *Ethics and the Archival Professions: Introduction and Case Studies*, 1.

² Ibid., 1.

ethical theory that is most notable through the writing of Immanuel Kant. From his ethical perspective, morality of choices does not depend upon justification through outcome of actions, but instead from following moral laws established by social norms. Those who enforce deontological ethics act in accordance to duties, rules, maxims, or rights. Therefore, while an action may result in a negative outcome, the action is moral because it performed an established rule.³ According to Kant, there exists a universal norm that everyone should act in the same manner and to go against this is immoral.⁴ This perspective expresses a sense of Western superiority because it denies the existence of cultural norms outside of its own.

Teleological ethics, also known as consequentialism, embrace a completely different perspective. In consequentialism, the moral capacity of an action depends on the consequence it produces, such as pleasure or pain. On the other hand, deontological theories base the moral capacity of an action on how it conforms to a universal moral norm and does not reflect on consequence. In deontology, the right action can produce bad consequences. This is not possible in consequentialism.⁵ Because of the dichotomy between deontology and teleology, professional ethics combined the two to create an ethical theory that would address the controversies of decision making in professional organizations. This combination did not last long in the SAA

The emergence of a professional code of ethics for archivists did not occur until 1955, which is quite some time later compared to other organizations in the United States. This original code, called “Archivists’ Code,” came into being through the National Archives and Records Administration and acted as the sole guidance for archival institutions in the United States until

³ Larry Alexander and Michael Moore, “Deontological Ethics 2. Deontological Theories,” *The Stanford Encyclopedia of Philosophy*, (Winter 2012): <http://plato.stanford.edu/entries/ethics-deontological/>.

⁴ Immanuel Kant, *Fundamental Principles of the Metaphysic of Morals*, 1785
<http://www.gutenberg.org/dirs/etext04/ikfpm10.txt>.

⁵ Alexander and Moore, “Deontological Ethics 1. Deontology’s Foil: Consequentialism,” *The Stanford Encyclopedia of Philosophy*, (Winter 2012): <http://plato.stanford.edu/entries/ethics-deontological/>.

1980, when the SAA created its first “Code of Ethics for Archivists.” This code underwent revisions in 1992 and 2005.⁶ Through evaluating the past versions of the “Code of Ethics for Archivists,” the dualism of deontological and teleological approaches presents itself, as does a shift from positivist to postmodernist practices. Jimerson identifies these approaches: “The 1980 and 1992 codes employed a primarily deontological formulation of archival ethics using terms such as ‘archivist shall...’ or ‘archivists must not...’ The code also included teleological statements to explain reasons for certain archival practices or the expected consequences of actions.”⁷

The reasoning behind the transition in ethical theories correlates with the changes in society in the mid-twentieth century. During this time, archivists began to question their archival practices because of societal upheavals, which included the end of the apartheid in South Africa; the fall of communism in Eastern Europe; and the former Soviet Union, and China entering as a power house in economics, politics, and globalization. These changes in society created a shift in the perception of national identity and social interactions, particularly due to the emphasis on archival memory through documentation of governance and societal infrastructure; therefore, these drastic societal changes prompted a reevaluation of archival professional ethics and the social responsibility that coincides with them.⁸

The vocabulary used in the 1980 and 1992 versions limited the archivist in his/her decision making process; therefore, the 2005 revision withdrew the examples that used teleological ethics in order to lessen the limitations. The more general “Code of Ethics” with

⁶ Randall C. Jimerson, “Ethical Concerns for Archivists,” *The Public Historian* 22 no.1 (Winter 2006): 87.

⁷ Ibid., 3.

⁸ Randall C. Jimerson, “Rethinking Archival Ethics,” This essay is excerpted from *Memory, Justice, and Accountability: The Role of Archivists in Society*, a book manuscript under review by the SAA Publications Board, 1, www.archivists.org/conference/.../sessionGlobalIssuesForum-Jimerson.doc.

deontological statements allows more freedom in finding solutions for ethical predicaments.

Following in the SAA's footsteps, numerous other archival organizations have created professional ethical codes. Interestingly, archival codes of ethics have ten unifying features.

These features are:

1. should treat both users and colleagues fairly, without discrimination or preference;
2. must preserve the intellectual and physical integrity of their records;
3. may never alter, manipulate, or destroy data in records;
4. should discourage restricting access to records except for essential reasons of legality, privacy, or confidentiality; and must apply any such restrictions without preference or bias;
5. should protect the privacy of donors, users, and individuals who are the subject of records, and observe all legitimate access restrictions;
6. may never personally profit from privileged information in their records;
7. should use impartial judgment, rather than personal beliefs or biases, when appraising records;
8. should not publicly disparage their colleagues or other archival institutions;
9. should not personally collect manuscripts or archival records in competition with their employers; nor appraise the fiscal value of materials donated to their own institutions;
10. should use their specialized knowledge and expertise for the benefit of society.⁹

These ten principles are only traditional representations of an archivist's ethical duties. As a consequence of removing teleological explanations, the principles become vague in their meaning, which allows varying interpretations and conflict with abstract concepts. Archivists need to balance the needs of the donors, researchers, and third parties, but what if one of these groups did not conform to the majority's social values and beliefs?¹⁰ What is not addressed are the controversies attendant to decision making in an archive.

These principles merely provide a foundation for the establishment of ethics; also it is important that they are not acknowledged as law but an expression of need to follow laws, statutes, and regulations formulated by local, state, or federal governments. Codes of ethics are a

⁹ Benedict, *Ethics and the Archival Profession*, 4-5.

¹⁰ Jimerson, "Rethinking Archival Ethics," 5.

set of guidelines that, as previously mentioned, establish a relationship with society based on trust. In typical Western societal standards, these principles provide the guidance that is applicable to their needs and confirm the relationship of trust between the archivist and society. This is the dilemma with ethics and Native Americans. The SAA's code of ethics uses a deontological mindset, which does not incorporate Native American values and ideals. So if ethics are a means to pursue social justice in accordance to ethical codes and established laws, a dichotomy exists between personal morals and justice. Ultimately, ethical decisions based on set standards become forms of oppression, especially in the areas of access, privacy, and confidentiality.

To overcome these differences and improve the care of indigenous cultural material, a great deal of attention has been placed on using a different ethical perspective. This perspective involves the incorporation of moral rights and the establishment of ethics of care. While this theory gained and continues to gain controversy and criticism, it embraces the well-being of underrepresented individuals in society. Maureen Sander-Staudt elaborates on this concept through the work of Daniel Engster:

that all human beings are dependent upon others to develop their basic capabilities, and that in receiving care, individuals tacitly and logically become obliged to care for others. Engster understands care as a set of practices normatively informed by three virtues: attention, responsiveness, and respect. Defining care as everything we do to satisfy vital biological needs, develop and sustain basic capabilities, and avoid unnecessary suffering, Engster applies these goals to domestic politics, economic justice, international relations and culture.¹¹

Here, care ethics embraces respect and diminishing of suffering. This theory focuses on minorities and marginalized groups. The importance of the need for ethical reform in archives and other institutions of memory cannot be stressed enough. The writings of Scott Cline and his

¹¹ Maureen Sander-Staudt, "Care Ethics- 8.Political Theory" *Internet Encyclopedia of Philosophy* (March 2011) <http://www.iep.utm.edu/care-eth/> (accessed April 6, 2013).

explanation of the role of the archive and the archivist promote the need for reform. Cline introduces a concept called “archival being,” which goes hand in hand with postmodern theory. Cline describes this concept as, “to mediate the power of archives and use it for the greater public good, archivists must engage their work with a deep understanding of what it means to be archivists, subscribe to a set of values that informs how they do their work, and embrace archival being. Four values are key to archival being: faith, radical self-understanding, intention, and integrating.”¹² Applying the concept of Cline’s archival being to the concern of Native American intellectual property rights, archivists need to reevaluate their surroundings and roles, realize the importance and consequences of archival appraisal and selection, and act based on limiting suffering and implementing respect for oral cultures that do not come from positivist based backgrounds. The inclusion of moral rights or ethics of care will allow archivists to see their role in preservation and memory not as merely educating the public, but also as preserving a cultural heritage. Attempts to gain endorsement of ethical reform in archives have taken place on national and international levels. These attempts are in the forms of protocols and declarations.

Call for Ethical Reform Through Protocols and Declarations

The case for Native American ownership and control over their traditional cultural expressions and traditional knowledge is a topic that for the past few decades influenced the drafting of numerous declarations and protocols. It is the new challenge to the archival profession. Advocacy of Native American rights to right years of oppression did not rise until the 1960s. With this new emphasis came a fight to restore cultural artifacts back to their rightful owners, encouraged by the Native American Movement. Following this movement was the Native American Grave Repatriation Act (NAGPRA), a federal statute that required museums

¹² Scott Cline, “To the Limit of Our Integrity: Reflections on Archival Being,” *The American Archivist*, 72 (Fall/Winter 2009): 331.

and collectors to return Native American artifacts and human remains back to the tribes. These were progressive steps for the Native American Movement; however, NAGPRA only returned physical property to the Native American people. Section 2 of NAGPRA refers to cultural items as human remains as well as funerary objects, sacred objects, and cultural patrimony, or objects with ongoing cultural significance.¹³ What about traditional or esoteric knowledge and expressions?

In 2005, the members of the SAA took part in the battle for Native American ethical reform by creating a petition that eventually led to inviting Native American archive representatives to address the topic of tribal archives. The result of the petition was the Native American Archivists Roundtable (NAAR) that declared its mission was, “to serve as a forum to educate archivists on the complexities and beauty of Native American archives of the Western hemisphere and as a source of communication and inspiration for archivists working with Native American collections.”¹⁴ The purpose of NAAR is to act as a tool for communication and information sharing on the sensitive topic of Native American intellectual property rights; however, since its foundation in 2005, its bylaws are still under review.

There are still lapses in the manner in which archivists deal with Native American archival material. One of these lapses is the SAA’s failure to endorse the Protocols for Native American Archival Materials (PNAAM). Established in April of 2006, nineteen individuals who included both native and non-native archivists, historians, museum curators, librarians, and anthropologists in order to, according to PNAAM, “identify best processional practices for culturally responsive care and use of American Indian archival materials held by non-tribal

¹³ Native American Graves Protection and Repatriation Act, Public Law 101-601, 25 USC. 3001 et seq., (November 16, 1990) *Federal Historic Preservation Laws*, 167, Section 2
<http://www.nps.gov/nagpra/mandates/25USC3001etseq.htm> (accessed October 29, 2013).

¹⁴ Native American Archives Roundtable, “Native American Archives Roundtable-Mission Statement,” SAA,
<http://www2.archivists.org/groups/native-american-archives-roundtable> (accessed July 22, 2013).

organizations.”¹⁵ The purpose of PNAAM is to promote the repatriation and proper handling of Native American archival materials in American institutions of memory. In the introduction on PNAAM’s website, their intent receives further explanation with:

Native American communities are sovereign governments. Tribes had their own traditional governments prior to European invasion. These governments maintain their own territories, their own laws, and their own legal restrictions surrounding cultural issues. Most Native American communities have federal recognition, while others hold state recognition. In Canada, many Native American communities have a similar status through federal treaties or provincial acknowledgement. Native Hawaiians are accorded special status by both federal law and state law. A number of federal laws in the United States specifically address both cultural and human rights of Native Americans and their communities. While we share a common commitment to the preservation and dissemination of knowledge, archivists and librarians should understand and respect Native American rights and laws, which are recognized in the United States Constitution. These statuses and associated rights form the basis of the principles behind the *Protocols for Native American Archival Materials*.

Through this introduction, PNAAM allows the readers of the protocols to begin to grasp the sensitive issues of indigenous intellectual property rights. By acknowledging the lack of attention paid to Native Americans and the lapse in allowing them their right to privacy and access, PNAAM encourages institutions of memory to incorporate its protocols into everyday practices. While professional organizations create and uphold their codes of ethics, the problem lies in the ethics themselves. The development of the SAA Code of Ethics stems from Western ideologies that Native Americans, as well as other indigenous cultures around the globe, do not embrace or fully understand.

PNAAM aims to create an equal and mutually receptive relationship between Native Americans and archives and libraries. Furthermore, PNAAM identifies the types of materials in archive or library facilities that need to be reevaluated for the purpose of either repatriation or to apply access restrictions to culturally sensitive materials. According to Kay Mathiesen, “The

¹⁵ Protocols of Native American Archival Material, “Protocols for Native American Archival Materials,” First Archivist Circle, <http://www2.nau.edu/libnap-p/protocols.html> (accessed July 23, 2013).

normative foundation of PNAAM's recommendations is that Native American tribes have rights over the TCE and TK held in libraries and archives. It is important to note that the rights claimed in PNAAM are *moral* rights; a "moral right" creates an obligation for others to respect it, whether or not the right is encoded in law."¹⁶ While PNAAM appears to be an ethical solution to an ethical problem, the protocols provoked a debate.

PNAAM challenges SAA at its core because it calls for extensive revisions to the society's written values and codes of ethics for the purpose of adhering to Native American archival concerns. These revisions include limiting access and enforcing restrictions, editing any terms that are in the titles and descriptions of archival materials considered offensive, creating a reference service that aids Native Americans in archives, and gaining Native American permission to access some materials.¹⁷ Mark Greene, former SAA president, while refusing to endorse the document, did say that PNAAM provided a new perspective that archivists could evaluate their policies in dealing with Native American holdings while also looking for new ways to engage the community. Yet, he also stressed his dissatisfaction with PNAAM because it raised fundamental questions about the foundation of archives and its traditional practice. At one point he even stated, "the *Protocols* raise such questions as whether traditional Western ways of study and knowledge are the only legitimate ones."¹⁸ Of course, Western values of study and education are not the only legitimate ones, which is the entire case set forth by Native Americans.

Furthermore, PNAAM received a great deal of backlash from other prominent archivists. John Bolcer of the University of Washington stressed the manpower and capital it would take to carryout PNAAM. He also disagrees with the automatic privileges Native Americans receive

¹⁶ Mathiesen, "A Defense of Native Americans' Rights," 457.

¹⁷ Jimerson, *Archive Power*, 356.

¹⁸ Ibid.

from PNAAM over other stakeholders. This is not to say that Bolcer does not want to reform archival policy at all, he just perceives PNAAM as a whole to be too overbearing with its demands.¹⁹ The importance of the backlash that PNAAM experienced is that it demonstrated the need for ethical reform because current archival practices and values benefit and privilege the rights of those who succeed in mainstream cultures, those of Western ideologies with notions of private ownership and long past of written history.²⁰ These are merely two examples, but the list could continue. Why not allow Native Americans the same privileges with their cultural records? That archivists, such as Bolcer, argue against PNAAM is evidence that ethical reform is a necessity in order to promote proper care of culturally sensitive materials. United States' institutions of memory need to acknowledge that the United States is not made up of one homogeneous cultural identity. Institutions of memory can better care for indigenous sensitive materials through reevaluating ethical standards through theories that do not promote Western philosophical ideals.

On a global scale, attempts at intellectual property reform for indigenous communities takes place within the United Nations and in its agency the World Intellectual Property Organization (WIPO). First, WIPO mentions indigenous rights regarding indigenous intellectual property in the United Nations drafted the *United Nations Declaration on the Rights of Indigenous Peoples* (DRIPS) in March of 2008. More specifically, article 31 of the declaration states:

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control,

¹⁹ Jimerson, *Archive Power*, 357.

²⁰ Ibid.

protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.²¹

While the entirety of DRIPS addresses concerns additional to intellectual property rights, the mention of Native American intellectual property rights was a milestone in the awareness of intellectual property rights for indigenous peoples. DRIPS, like PNAAM, encountered opposition. Upon its adoption by the General Assembly on September 13, 2007, DRIPS received 144 votes in favor, 11 refrains, and 4 votes against. Those opposed to DRIPS included Canada, Australia, New Zealand, and the United States.²² While the United States finally endorsed DRIPs in 2012 under the Obama administration, its delay in accepting the declarations goes hand in hand with SAA's failure to fully endorse PNAAM. This exemplifies a non-adherence mentality to ideals that go outside Western practices of not only capital gain but the mentality of ownership through copyright, recording, documenting, and making available information. However, the protocols and declarations did leave their mark. While the SAA did not officially endorse PNAAM's protocols and the United States federal government stalled in endorsing DRIPS, members of Native American tribes took matters to the digital realm to promote advocacy and collaboration with archives, museums, and cultural heritage centers.

²¹ United Nations General Assembly, A/RES/61/295, October 2, 2007, Article 31, http://legal.un.org/avl/ha/ga_61-295/ga_61-295.html (accessed October 29, 2013).

²² United Nations, "Declaration on the Rights of Indigenous Peoples," United Nations, First Paragraph <http://social.un.org/index/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx> (accessed July 23, 2013).

CHAPTER 5

BREAKING BOUNDARIES: ACHIEVEMENTS THROUGH DIGITAL REPATRIATION

Over the past twenty years, indigenous cultures have been in conflict with emerging technologies, particularly those of digitization and the internet.¹ While there have been attempts to lessen the effects of Western practices of copyright and research within Native American cultures in the United States, Native American attempts to advocate change in copyright legislation have not made substantial progress. Yet, these same technologies that create conflicts for indigenous cultures can also be used to their benefit. The internet, along with its various tools of social networking and resource sharing, enables Native American tribes to record, promote, and present their cultural heritage and diverse identities through digital archives. More importantly, Native American tribes use digital archives in ways acceptable and applicable to their needs. The establishment of digital archives is made possible through the practice of digital repatriation occurring in North America. Digital repatriation, also referred to as digital or virtual return, is a complex and ambiguous term with no clear definition. The repatriation of Native American cultural materials involves returning cultural materials to their place of origin such as through NAGPRA; however, as mentioned in previous chapters, NAGPRA does not include traditional cultural expressions, innovations, and documentary materials that are integral components to the sustainability and promotion of Native American collective memory. Digital repatriation aims to correct this lapse in cultural sensitivity by, as Kimberly Christen states, returning objects “in their digital form—into existing community practices, traditions, and contemporary cultural production through the creation of digital archives.”² Unlike NAGPRA, digital repatriation is not a piece of legislation. Instead, it is a process that is a product of ethical

¹ Digital Return, “Home,” Digital Return, <http://digitalreturn.wsu.edu/> (accessed June 18, 2013).

² Kimberly Christen, “Opening Archives,” 185.

reform and awareness of cultural sensitivity promoted through PNAAM. The cooperation of archives and museums to work with Native American communities is an integral component in overcoming copyright dilemmas, which is why digital repatriation is important. As mentioned in the introduction, the role of the archivists includes responsibility for preserving and interpreting the past.

Specifically, this chapter demonstrates how previously-discussed proposals and declarations for ethical reform regarding indigenous intellectual property rights have initiated progress in creating change in archives and other institutions of memory. While American institutions did not sign or completely comply with proposals and declarations in their entirety, the idea of ethical reform and a need to respect for indigenous materials situated itself in their institutional framework, through digital repatriation.

Digital Return

Digital Return, as defined by its website, “is a research network and online resource providing a place for dialogue and connection and direct links to people and projects related to the return of cultural and linguistic materials to Indigenous communities globally.”³ This online resource and networking center is a collaborative effort to promote digital repatriation of indigenous cultural material while also enabling an open discussion forum to address the conflicts and developing ideas revolving around repatriation. Sponsored by the Smithsonian Institute, the National Science Foundation, and Washington State University, *Digital Return* encompasses a wide array of digital archive projects, presentations, events, publications, and resources that represent numerous diverse indigenous cultures.

The strength of *Digital Return* lies in its promotion of cooperation with representatives from differing academic and professional fields. On January 19, 2012, *Digital Return* hosted a

³ Digital Return, “Home,” Digital Return, <http://digitalreturn.wsu.edu/> (accessed June 18, 2013).

workshop titled, “After the Return: Digital Repatriation and the Circulation of Indigenous Knowledge,” at the National Museum of Natural History in Washington DC.⁴ The workshop brought together scholars from indigenous communities, anthropology, museums, cultural centers, and archives. Together, these participants discussed and documented the practices for digital repatriation. Through the workshop, noted on the *Digital Return* blog:

participants explored and shared experiences of digital return projects focused on linguistic revitalization of endangered languages, cultural revitalization of traditional practices and the creation of new knowledge stemming from the return of digitized material culture from the Arctic to Arizona. Participants sought to understand the broad impact of such technological changes and cultural needs on individual communities as well as regional and international networks.⁵

This workshop took on the form of an informal conference that promoted open discussion through question and answer. It addressed the important aspects and challenges of creating partnerships in order to repatriate linguistic and cultural materials. The inspiration for forming partnerships, both in person and through technological innovation, stems from various repatriation movements, the implementation of digital technologies in sites of memory, and promotion of rebuilding indigenous cultures. The workshop also addressed the current work of the Smithsonian on repatriation, the complications that arise with various stakeholders, access, and how collaboration transforms cultural knowledge.⁶

This initial workshop resulted in the further promotion, progress, and development of numerous projects and workshops held by the National Museum of Natural History, Cambridge University, and Yale University; yet with the progress and promotion of projects one question still lingered. In his address, the keynote speaker for the first *Digital Return* workshop, Jim

⁴ Digital Return, “News,” Digital Return, <http://digitalreturn.wsu.edu/blog/2012/01/19/digital-return-workshop/> (accessed June 18, 2013).

⁵ Ibid. It is important to note that I was not at attendance to this workshop; however, available on the site is the keynote address by Jim Enoté

⁶ Digital Return, “Workshop Program,” Digital Return, <http://digitalreturn.wsu.edu/workshop-program/> (accessed June 18, 2013).

Enote, addressed sensitive subjects regarding Native American intellectual property rights and access. Jim Enote belongs to the Zuni tribe located in New Mexico. He is the director of the A:shiwi A:wan Museum and Heritage Center in Zuni, New Mexico, where he specializes in the conservation of native cultures.⁷ Enote began his address with personal stories regarding digital repatriation and the digital circulation of knowledge.⁸ First, he spoke of his late grandmother, her adventurous life that very few knew of, how she educated Enote through oral stories, and how he encountered access complications when researching her past later in his life.⁹ Continuing on this subject of access, Enote discussed a similar problem he faced when researching the life of his late grandfather.¹⁰ Through communication and research, Enote realized that the world consists of numerous ontologies. Within these ontologies are communities that view access to knowledge as a set of processes or permissions that are not entirely different from those indigenous communities. Access is a sensitive topic, as is copyright and the ownership of materials that promote cultural heritage and history; however, the procedures in granting or gaining access come from socializing and communication.¹¹ Therefore, Enote stresses the importance of collaboration between members of different cultures to specify restrictions on access. These stories allowed Enote's audience to comprehend, understand, and empathize with the compassion and integrity of his efforts for his center's project of consolidating Zuni collections from six separate museums.¹²

⁷ Museum of Northern Arizona, "Jim Enote," Museum of Northern Arizona, http://www.mnaventures.org/guides_enote.html (accessed June 18, 2013)..

⁸Digital Return, "After the Return: Digital Repatriation and the Circulation of Indigenous Knowledge, Keynote Speaker Jim Enote," Digital Return Website, Kultura Open Source Video File. <http://digitalreturn.wsu.edu/workshop/>.

⁹ Digital Return, "Keynote Speaker Jim Enote."

¹⁰Ibid.

¹¹ Ibid.

¹² Ibid.

Enote's relation to *Digital Return* stems from his work with the Zuni community and its efforts to regain its cultural heritage materials through digital repatriation. His project began when the Zuni found misinformation in numerous museum digital collections, mainly collection catalogues. With technological innovations and the ease of accessing digitized information online, this discovery caused great concern. Therefore, Enote and members of the Zuni community began to collaborate with museums to allow access to their digital collections and connect them with the Zuni software system to correct misinformation. Enote referred to this project as the *Zuni Consolidated Collection System*. This system brought together Zuni cultural materials from six different museums on a digital archive system at the A:shiwi A:wan Museum and Heritage Center. Through the technology of the *Zuni Consolidated Collection System*, the Zuni people, with technological access, can gain access to the system, see the collections, and comment on them via text, video, or audio. With this system, the Zuni determine what knowledge is appropriate for public display and what remains private due to cultural sensitivity, an important feature to help prevent cultural appropriation.¹³

There remains one concern, however, with the progress of the *Zuni Consolidated Collection System*. Enote emphasizes the negatives of digital repatriation because of copyright. If indigenous institutions and communities receive digitally-repatriated content and cultural materials, do they in fact have copyright over those materials? Are the materials merely copies that they have to accredit to a Western-influenced institution? Does not true repatriation imply ownership?¹⁴ These are the questions that *Digital Return* aims to research and solve. Through collaboration, research, and promotion, the partners of *Digital Return* and their projects exhibit

¹³ Digital Return, "Keynote Speaker Jim Enote."

¹⁴ Ibid.

diverse approaches of finding a common ground between Western and indigenous concepts of cultural knowledge, copyright, and access.

Digital Return's site provides resource links that connect to digital archiving and collection projects promoting digital repatriation and cultural revitalization. Among these resources are events, presentations, digital projects, and publications. The links to projects provide not only a national perspective on digital repatriation, but also a global perspective by including links to international digital repatriation projects. For instance, *Digital Return* provides links to the *Digital Himalaya Project*, *Inuvialuit Living History*, *Mukurtu*, *Museum of Memory*, *Objects of Exchange: Social and Material Transformation on the Late Nineteenth-Century Northwest Coast*, *Plateau Peoples' Web Portal*, *Reciprocal Research Network*, *Recovering Voices*, and the *World Oral Literature Project*.¹⁵ This chapter does not discuss all of these projects because they do not relate specifically to the topic of Native American cultures.

While *Digital Return* does not necessarily create its own projects, it is integral in providing a hub for collaboration to promote the digital repatriation movement. The site presents a plethora of information that showcases indigenous cultures as embracing technology and the Western ideals of research and documentation, which is an important realization because in their past these acted as tools for oppression. Because indigenous cultures are cultures of orality and communal ownership, the idea of recording their history through writing and claiming ownership to their cultural expressions did not fit into their cultural practices. Yet, now they are using Western forms of technology not only to create a written record, but also to reclaim it. While the call for institutions of memory in North America, and particularly in the United States, to adhere to and to sign new declarations of ethical standards such as PNAAM and the United Nations DRIPS did not gain success at first; the values and protocols of mentioned declarations link to

¹⁵ Digital Return, "Resources," <http://digitalreturn.wsu.edu/resources/?type=project> (accessed June 18, 2013)..

the digital return movement. Most notable is the element of collaboration and building of relationships of mutual respect mentioned in PNAAM and discussed in the previous chapter, something *Digital Return* embraces, and which also acts as a foundation of the digital repatriation movement. To be more specific, PNAAM states

Collecting institutions and Native communities are encouraged to build relationships to ensure the respectful care and use of archival material. Meaningful consultation and concurrence are essential to establishing mutually beneficial practices and trust. Through dialogue and cooperation, institutions and communities can identify mutually beneficial solutions to common problems and develop new models for shared stewardship and reciprocity or for the appropriate transfer of responsibility and ownership for some materials.¹⁶

Digital Return Projects

The following examples of projects exhibit the progress made thus far in the movement of digital repatriation. The projects described in detail below either relate directly to indigenous cultures in the United States (U.S.) or have direct links to U.S. institutions of memory. While digital repatriation is a global movement, the focus of this thesis is on select U.S. indigenous cultures and U.S. institutions.

The *Plateau People's Web Portal*, a web project created by the Plateau Center for American Indian Studies at Washington State University and members of the Coeur d'Alene, Umatilla, and Yakama nations, provides access to the digital cultural materials of Native American plateau tribes in the United States. This web portal allows access to exhibits collections held by the Washington State University's Libraries, Manuscripts, Archives and Special Collections (MASC); the Museum of Anthropology, the National Anthropologic Archive at the Smithsonian, and several national donors. The importance here is the collaboration of Western archives and museums with members of Native American tribes to form a digital

¹⁶ Protocols for Native American Archival Materials, "Building Relationships of Mutual Respect," First Archivist Circle, April 9, 2007, <http://www2.nau.edu/libnap-p/protocols.html> (accessed June 18, 2013)..

archive. The digital materials accessible on the web portable underwent a selection and curatorial process by members of Coeur d'Alene, Umatilla, and Yakama nations along with the staff of MASC. While digital repatriation through cooperation did not grant the tribes copyright over the physical cultural materials housed in archives and museums, it did allow these three Native American nations to achieve progress in the copyright dilemma. With the formation of the web portal and the repatriation of digitized materials such as documents, photographs, videos, and sound recordings, members of these Native American cultures now have control over the interpretation of their cultural histories, as well as access to their collections.¹⁷ Digital repatriation allows Native Americans to have digital access to and control of their digitized cultural materials so they can better promote their heritage and educate their communities.

Another important component of digital repatriation is its broadening effect on the archival record by allowing members of Native American tribes incorporate their own interpretations and perspective of their cultural materials. This creates a new paradigm of archiving because it promotes Native American methods of recording history through orality, while also combining Western motives of creating a written record through the internet.¹⁸ The web portal states, "This project aims to create not just a digital portal to view content, but also a different paradigm for the curation, distribution, and reproduction of Native peoples' cultural materials."¹⁹ The portal contributes to the creation of this paradigm by allowing members of native cultures access to the uploaded material in order to add commentary or flag material that is too culturally sensitive. For instance, to view some collections on the portal, members need to create a login. The web portal is an educational digital archive that educates the general public

¹⁷ Plateau People's Web Portal, "About," Plateau People's Web Portal, <http://plateauportal.wsulibs.wsu.edu/html/ppp/help.php> (accessed June 18, 2013).

¹⁸ Ibid.

¹⁹ Ibid.

on the histories, cultures, and heritages of Native Americans in the plateau region, while also educating Native American community members on their own history and culture. Access to culturally sensitive materials, such as sacred ceremonies and gender specific rituals, can be labeled private and have restricted access for certain tribal members.²⁰ Coming from a Western perspective, the practice of restricting access seems threatening because of the early discussion of Western society promoting the right to information. Yet, Native American culture contains sacred elements that can be gender specific and, therefore, to maintain and promote their heritage and cultural identity, setting aside the cultural relativism of Western practices becomes an integral component in the preservation of their heritage. Therefore, not only does this site promote collaboration but it also enables members of Native American cultures direct administrative control of their intellectual property so they may provide appropriate interpretations and safely depict their heritage. The involvement of Native Americans in identifying and removing culturally sensitive material exemplifies the declarations laid out in PNAAM.

The tribes represented on the *Plateau Peoples' Web Portal* include the Coeur d'Alene, Colville Confederated Tribes, Spokane, Umatilla, and the Yakama.²¹ Overall, there are nine broad categories for easy browsing, yet administrative members of the tribes can expound upon the categories by adding their own subcategories. The broad categories include education, ceremony, architecture and dwellings, lands, natural resources, economy/economic development, lifeways, language, religion, wars/military/conflict, government to government relations, and

²⁰ Plateau People's Web Portal, "Curation Process," Plateau People's Web Portal, <http://plateauportal.wsulibs.wsu.edu/html/ppp/help.php?topic=2> (accessed June 18, 2013).

²¹ These Native American tribes are located in the Northwestern region of the United States in Washington, Oregon, Idaho, and Montana, as well as the bordering portion of southeastern Canada and British Columbia. For more information visit <http://plateauportal.wsulibs.wsu.edu/html/ppp/index.php> (accessed September 15, 2013).

artistry and artifacts.²² Researchers can search either the main archive that includes content from all of the tribes under each category or researchers can search within each tribe's collection. The content on the site consists of both digitally repatriated copies of cultural materials, digitized personal records of the tribes, and original materials such as audio and visual records generated for the purpose of the site for education and outreach. The different collections allow visitors to comment on the various images, videos, audio, content notes, and links to the cultural institutes that correlate with each tribe.²³ This allows optimal interaction between tribes and exploration of the various cultural material of Native American tribes represented through the *Plateau People's Web Portal*. Commenting on this new interactive format, the site states, "Whereas in many museum and archive settings knowledge is 'given,' here we have sought to create a space to open dialogue and allow many perspectives to sit side by side. Instead of 'finding' information, the portal seeks to be a space where knowledge is created in constant conversation."²⁴ This dialogue uses various forms of Web 2.0 technologies to create an open stream of communication and information sharing. These forms include geo-tracking, feedback loops, custom tagging, and comments created by users.²⁵

In a different light, yet just as important to the digital repatriation movement, is the software project known as *Mukurtu*, which according to its mission statement, "is a grassroots project aiming to empower communities to manage, share and exchange their digital heritage in culturally relevant and ethically-minded ways. We are committed to maintaining an open, community-driven approach to *Mukurtu's* continued development. Our first priority is to help

²²Plateau People's Web Portal, "Main Archive," Plateau People's Web Portal <http://plateauportal.wsulibs.wsu.edu/html/ppp/browse.php> (accessed September 15, 2013).

²³ Plateau Peoples' Web Portal, "Curation Process," <http://plateauportal.wsulibs.wsu.edu/html/ppp/help.php?topic=2> (accessed June 18, 2013).

²⁴ Ibid, "Visitors," <http://plateauportal.wsulibs.wsu.edu/html/ppp/help.php?topic=3> (accessed June 18, 2013).

²⁵ Ibid.

build a platform that fosters relationships of respect and trust.”²⁶ *Mukurtu* is a Warumungu word that translates to “dilly bag”. It acts as a virtual safe, or digital archive, for cultural material while also allowing tribes to safely and appropriately share, create, and replicate cultural materials.²⁷ Like the RNN, *Mukurtu* is a networking and file sharing resource that allows users to manage and share their digital materials according to their ethical standards. It even has a mobile application so users can record, share, or store cultural material regardless of location.²⁸

While *Mukurtu* presents an entirely different perspective to digital repatriation compared to the previous projects, its significance lies in its innovated software that allows native tribal members to record and make available their heritage on their own accord. Originating in Australia, *Mukurtu* was a response to the needs of the Warumungu Aboriginal community to provide adequate and culturally sensitive preservation and management techniques for their digital materials.²⁹ *Mukurtu* is a global site that links to other portals, such as the *Plateau Peoples’ Web Portal*, as well as the *National Museum of the American Indian*, as part of its community.³⁰ Its popularity lies in its culturally aware features, the first being its cultural protocols. Cultural protocols allow users to set their own access and privacy settings in relation to their cultural values. Settings regarding access to digital collections can range from open public access to restricted access for certain groups or individuals users have the ability to change these settings at anytime.³¹ Accompanying access features are exclusive and specially created options for traditional knowledge labels and licenses. The licenses make it possible for indigenous members who create digital content to manage the use of their content by outside

²⁶ Mukurtu, “Mission,” Mukurtu, <http://www.mukurtu.org/#mission> (accessed July 10, 2013).

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid., “Community,” Mukurtu, <http://www.mukurtu.org/content/community> (accessed July 10, 2013).

³¹ Ibid., “Cultural Protocols,” Mukurtu, <http://www.mukurtu.org/content/cultural-protocols> (accessed July 10, 2013).

parties while the labels provide guidance for users involved with culturally sensitive materials.³²

Both of these features place the sensitivity and privacy of cultural materials first in order to establish respect and responsibility within the online community.³³

The final features that *Mukurtu* offer is its “Roundtrip” feature that allows for the circulation of content on digital archive and a mobile application. The “Roundtrip” feature allows users to update their content while also exporting it to digital exhibits in collaborating museums or libraries. More importantly, users still have control over the privacy and access setting while moving content in and out of *Mukurtu*.³⁴ The “Mukurtu Mobile” application goes hand in hand with the “Roundtrip” feature. Not only is it easy to move content in and out of *Mukurtu*, but it is also easy for users to manage their content anywhere. Even if internet access is not available, “Mukurtu Mobile” has a storage feature that stores content until an internet signal becomes available.³⁵

Intellectual Property Issues in Cultural Heritage: Theory, Practice, and Policy Ethics, IPinCH

IPinCH, previously mentioned during the discussion of the *Inuvialuit Living History* project, dedicates itself to promoting organizations and projects to repatriate cultural materials, particularly in the area of intellectual property. According to its mission statement, IPinCH is:

an international collaboration of archaeologists, Indigenous organizations, lawyers, anthropologists, ethicists, policy makers, and others working to explore and facilitate fair and equitable exchanges of knowledge relating to archaeology. We are concerned with the theoretical, ethical, and practical implications of commodification, appropriation, and other flows of knowledge about the past, and how these may affect communities, researchers, and other stakeholders.³⁶

³² Mukurtu, “TK Licenses and Labels,” Mukurtu, <http://www.mukurtu.org/node/27> (accessed July 10, 2013).

³³ Ibid., “TK Licenses and Labels.”

³⁴ Ibid., “Roundtrip,” Mukurtu, http://www.homes.com/listing/193366604/803_Windsor_St_WILMINGTON_DE_19801/ (accessed July 10, 2013).

³⁵ Ibid., “Mukurtu Mobile,” Mukurtu, <http://www.mukurtu.org/node/36> (accessed July 10, 2013).

³⁶ IPinCH, “Project Description,” IPinCH, <http://www.sfu.ca/ipinch/about/project-description> (accessed July 13, 2013).

Dr. George Nicholas of Simon Fraser University in British Columbia heads IPinCH and promotes its vision and purpose. IPinCH's vision and purpose is to provide a foundation for exploration and research resources for indigenous community members, archaeologists, anthropologists, scholars, and various other stakeholders who create projects to analyze and support the exchange of cultural knowledge in a manner that is unbiased, open-minded, and interdisciplinary in fashion. IPinCH is a seven year project co-developed by Dr. George Nicholas and Dr. Julie Hollowell from Indiana University. A significant aspect of IPinCH is its collaborative nature that expands across the globe. While the co-developers represent Simon Fraser University and Indiana University, there are three other universities that contribute to the administrative powers: University of Alberta, University of Oklahoma, and the University of Victoria. To further the explanation of IPinCH's collaborative initiative, the program consists of indigenous nations and communities, institutions, organizations, and members from numerous countries around the world, including Australia, the United States, New Zealand, Switzerland, South Africa, United Kingdom, and Germany. With this collaboration, IPinCH has the ability to fund student fellowships, research support endeavors, and community-based projects and research.³⁷

IPinCH commits itself to providing support for community-based projects called IPinCH Community-based Initiatives. Located across the globe, these projects focus on specific indigenous groups with intellectual property problem in countries in Canada, Australia, Japan, United States, New Zealand, and Kyrgyzstan. Currently, there are fifteen Community-based Initiatives that dedicate themselves to exploring and recording diverse reactions, viewpoints, and policies regarding intellectual property rights in specified communities. The statistics and results

³⁷ IPinCH, "Project Description."

gathered from the initiatives provide the foundation with research and progress for IPinCH's Working Groups.³⁸

There are eight IPinCH Working Groups, or research neighborhoods, that work with the Community-based Initiatives by bringing an interdisciplinary perspective to interpret the Initiatives data. Together with research partners, scholars, and students, the Working Groups analyze information to create seminars, forums, and other forms of outreach. These forms of public outreach aim to tackle intellectual property concerns within indigenous communities and to promote collaboration among indigenous communities and Western institutions.³⁹

All of the information collected and analyzed by Initiatives or Working Groups ends up in IPinCH's online archive, the IPinCH Knowledge Base. This database allows the members of the public, researchers, or students to access its holdings, which include legislation, research data, documents, scholarly articles, research protocols, and case studies. The entirety of the Knowledge Base holdings received access approval by all those involved with its content, both communities and stakeholders.⁴⁰ The Knowledge Base is only one of many means by which IPinCH provides resources to the interested public. The website also includes links to publications, presentations, reports, fellowship opportunities, resources for teachers, an IPinCH blog, news for IPinCH, and other intellectual property right activities and events.

Overall, IPinCH is an international effort to confront the problems of intellectual property rights of indigenous communities by promoting and funding numerous projects across the globe. Through its efforts, IPinCH collects and produces material that incorporates a global perspective

³⁸ IPinCH, "IPinCH Community-Based Initiatives," IPinCH, <http://www.sfu.ca/ipinch/project-components/community-based-initiatives> (accessed July 13, 2013).

³⁹ Ibid., "Working Groups," IPinCH, <http://www.sfu.ca/ipinch/project-components/working-groups> (accessed July 13, 2013).

⁴⁰ Ibid., "The IPinCH Knowledge Base," IPinCH, <http://www.sfu.ca/ipinch/project-components/knowledge-base> (accessed July 13, 2013).

so its team members can address intellectual property issues, while promoting ways to exchange or repatriate cultural knowledge in a fair and respectful manner.

Digital Partnership with Indian Communities (DPIC)

DPIC, under the direction of Dr. Timothy B. Powell, promotes collegiate student research and collaboration with Native American cultures. DPIC, as stated on its site, “explores how indigenous knowledge systems can deepen academic forms of understanding and how digital technology can be used to revitalize American Indian culture and language in ways that empower these communities.”⁴¹ DPIC acts as an advocate for progress through digitations which it exemplifies through its students’ projects. Differing from *Digital Return* and the various projects discussed earlier, DPIC’s research projects focus on one topic each, instead of being interactive websites of networking and information sharing. Yet, the projects embrace the collaborative initiative prominent in their close relations with Native American tribes and the ways they present their material, which is an integral component to both digital repatriation and PNAAM.

The projects through DPIC are digital representations of student research in exhibit form through collaboration with the University of Pennsylvania, the White Earth Tribal Community College, Itasca Community College, American Philosophical Society, Penn Cultural Heritage Center, Penn Museum, Center for Native American Studies, and the Minnesota Historical Society.⁴² These projects intertwine Native American experience through digital interviews, storytelling, archival content, and past and present social constructions to capture the evolution of various Native American histories while also preserving language, identity, and culture.⁴³ The research project topics include: “Traditional Medicine,” “The Last Battle at Sugar Point,” The

⁴¹ Digital Partnerships with Indian Communities, “About US,” Digital Partnership with Indian Communities, <http://www.sas.upenn.edu/dpic/about-US> (accessed July 13, 2013).

⁴² Ibid.).

⁴³ Ibid, “Welcome,” Digital Partnerships with Indian Communities, <http://www.sas.upenn.edu/dpic/> (accessed June 18, 2013).

History of the Water,” “Cherokee Stickball,” “Health Care Sensitive Training,” “Anishinaabemowin & Cultural Identity,” “William Berens,” “A. Irving Hallowell: Two Views of an Ojibwe Drum,” and “Ben Fletcher’s Project.”⁴⁴ Each project presents a unique account of Native American identity, culture, and history that uses digital technologies such as streaming videos and digitized photo collections. By digitizing photograph collections and video interviews, DPIC plays a role in the digital repatriation movement by providing access to the “A. Irving Hallowell Collection” with its digital photograph collection. DPIC defines digital repatriation as

Artifacts are repatriated digitally by doing a detailed photographic documentation of the objects, which are then made available by an electronic source. This digital repatriation of artifacts allows Native Americans to have access to their own artifacts and cultural heritage items, that they would be previously not have access to. These items range from anything from family photographs to sacred and religious items.⁴⁵

What is unique is the involvement of young scholars in these projects. While *Digital Return* and the projects that collaborate with its efforts provide significant outreach and education materials to the public that aids in revitalizing Native American cultures through digital repatriation, it relies heavily upon the work of professionals and specialists. By involving young scholars currently obtaining their undergraduate degrees, DPIC advocates reform and change in a younger generation. By instilling such values in a younger generation that will soon enter the professional realm that controls societal memory, DPIC acts as a foundation and coordinator for ethical and intellectual property reform for the years to come.

Through these projects, indigenous cultures manipulate Western technologies to regain, retain, and revitalize their cultural heritage in a manner that reflects their specific values and

⁴⁴ Digital Partnerships with Indian Communities, “Projects,” Digital Partnership with Indian Communities, <http://www.sas.upenn.edu/dpic/projects> (accessed June 18, 2013).

⁴⁵ Ibid., “Digital Repatriation and Virtual Exhibition,” Digital Partnerships with Indian Communities, <http://www.sas.upenn.edu/dpic/Drum/Welcome/VirtualMUSEum> (accessed September 17, 2013).

needs. While both the SAA and the United States government refused to sign or agree with current declarations to protect the integrity and rights of Native American cultural materials, reform and progress have been executed through the initiatives of community leaders. While not all of the projects addressed in this chapter related directly to Native Americans, the projects were either based from or incorporated in American institutions. Digital technology opened a new perspective on outreach and communication that enabled and encouraged indigenous people to present their ideas, values, and points of concern with current representations of their cultural heritage and identity. Ultimately, digitizing became a source of advocacy and collaboration that is still ongoing with numerous hurdles to jump. The importance here lies in the collaboration that led to the attempts of resolution and an open stream of communication between members of Western and indigenous cultures on a national and global scale.

CHAPTER 6

CONCLUSION

Verne Harris once wrote, “The archival record, I have argued, is best understood as a sliver of a sliver of a sliver of a window into process. It is a fragile thing, an enchanted thing, defined not by its connections to ‘reality,’ but by its open-ended layering of construction and reconstruction. Far from constituting the solid structure around which imagination can play, it is itself the stuff of imagination.”¹ The purpose of this thesis was to take an interdisciplinary perspective on the current debate of Native American intellectual property rights in American institutions of memory, mainly archives, in order to reveal the complexities and possible solutions to advocating cultural reform in Western dominated pluralistic societies. While not necessarily a solution, yet a step in the right direction, Native American digital archives and digital repatriation projects represent slivers of slivers of numerous Native American cultural histories slowly being rebuilt and preserved.

Native American digital archives and digital repatriation projects represent Derrida’s process of deconstruction discussed in Chapter One because they provide of cultural texts with numerous influences and interpretations. Introducing this perspective by implementing poststructuralist and postmodernist theories into understanding the development of knowledge and the study of culture, it can be seen that Western interpretations of knowledge and the means to record history have adversely affected Native American collective memories and cultural identities. Chapters One and Three identified the non-conformity of Native American cultures to Western positivism and copyright ideals as a consequence of their orality. However, through digital repatriation and digital archives, Native Americans now have the tools to create recorded histories based on their experiences and interpretation.

¹ Verne Harris, *Archival Sliver*, 86-85.

Chapter Two presented the works and opinions of other academics on the subject of Native American intellectual property rights and the ownership of cultural materials and expressions. This chapter discussed diverse opinions, such as Megan M. Carpenter's call for copyright law reform and Michael Brown's argument that to alter copyright law would cause global implications to the already established laws that protect the right to information.² Both Carpenter and Brown examine the global implications of copyright on indigenous societies. While Carpenter calls for total reform and backs up her perspective by stating, as quoted in Chapter Two, "Intellectual property law is a dynamic body of law that has a history of adapting to evolving conceptions of works and their protectorate," and second, "theorists and practitioners must advocate conforming the law to the needs of a global community."³ Carpenter does have a point. Copyright law has adapted since its origination in fifteenth century Europe in order to suit the needs of society. Chapter Three described this evolution of law in minor detail from the invention of the printing press, to the Act of Anne in 1709, to the development of US law in 1790, and the reforms made to US Copyright Law such as in 1976 and 1998; however, the enactment of these adaptations was to benefit Western society and its pursuit of knowledge. Therefore, how does society alter a Western law that is so ingrained in modern society to include the rights of indigenous minorities? According to Brown, it is not possible, because altering already established copyright law in a Western-dominated nation will create an imbalance regarding the access to knowledge.⁴ In other words, Brown fears that adjusting copyright to suit

² Brown, *Who Owns Native Culture?* 59.

³ Carpenter, "Intellectual Property Law and Indigenous Peoples," 77-78.

⁴ Brown, *Who Owns Native Culture?* 59.

the needs of one cultural minority will create a chain effect of copyright reform that might benefit corporate institutions to the point of reestablishing monopolies in the copyright realm.⁵

The creation of Native American digital archives through digital repatriation attempts to satisfy the two extremes presented by Carpenter and Brown. Yet, digital repatriation and digital archives are not solutions, and instead are reactions to Western oppression through copyright law and positive portrayals of learning, writing, and thinking. Digital repatriation and digital archives do not represent the solution because there are still many aspects of digital repatriation left clouded and full of questions. Jim Enote pointed this out in his address to the *Digital Return* workshop. Specifically, he questioned who actually owns the copyright of digitally repatriated cultural materials and expressions. It is important to stress that digital repatriation does not repatriate the physical materials but merely the digital representation.⁶ As mentioned earlier, digital repatriation projects aim to address these questions and find a meeting ground for future Native American and Western interactions regarding cultural materials and traditional cultural expressions in institutions of memory.

Verne Harris states, “There is little attempt to address the new realities being fashioned by technological revolution and postmodernist epistemologies. The positivist paradigm posits archival records as providing a reflection of ‘reality’.”⁷ This reality is a product of positivist archival theorists, such as Jenkins, Müller, Feith, and Fruinn, that enabled Native Americans and other non-white and non-western cultures to become degraded due to their difference in transmitting their cultural history and heritage. Instead they rely on stories and rituals and other forms of esoteric knowledge, passed down from generation to generation⁸. How is this reflected

⁵ Brown, *Who Owns Native Culture?* 59.

⁶ Digital Return, “Keynote Speaker Jim Enote,” 25:58.

⁷ Verne Harris, *Archival Sliver*, 82-83.

⁸ Nason, “Traditional Property and Modern Laws,” 259.

in positivist theory? It is not. Positivist theory, as this thesis has argued, benefits Western societies because they have a written record to accompany their ‘reality’.

Innovations in technology improved the way the world communicates and shares culture. In order to preserve this interaction, Western societies need to change the way they perceive and interpret knowledge. The application of poststructuralist theory to the formation of knowledge through deconstruction allows the faults and archaic principles of positivism to stand out. However, these principles still exist in the Western institutions. By using postmodern practices of archiving and realizing the archivist’s role in creating collective memory, archivists can create archives that can better handle the materials of minority cultures. The formation of Native American digital archives and digital repatriation projects is an example of the current shift in archival practice. By combining poststructuralist ideals of deconstruction and subtext with postmodern interpretations of cultural materials, Native Americans create layers in their digital archives and projects through collaboration, communication, and digital technologies to promote oral traditions and share comments. These archives and projects are the beginning of change brought forth through calls for ethical reform and the realization that to thrive, Native Americans must begin to use Western technologies to promote their cultural identity and history and break through positivist mind sets.

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